AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Federal Register

8–25–05 **Thursday**
Vol. 70 No. 164 **Aug. 25, 2005**

Pages 49845–50148

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WHEN: Thursday, September 22, 2005
9:00 a.m.–Noon

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

Printed on recycled paper.

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A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Rules and Regulations

Federal Register
Vol. 70, No. 164
Thursday, August 25, 2005

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2005–22159; Airspace Docket No. 2005–ASW–11]

Establishment to Class E Airspace; Santa Teresa, NM

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This action establishes the Class E airspace area at Dona Ana County, Santa Teresa, NM (K5T6) to provide adequate controlled airspace for the area navigation (RNAV) global positioning system (GPS) standard instrument approach procedure (SIAP).

DATES: Effective 0901 UTC, October 27, 2005.

Comments for inclusion in the Rules Docket must be received on or before September 27, 2005.

ADDRESSES: Send comments on the rule to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number, FAA–2005–22159/Airspace Docket No. 2005–ASW–11, at the beginning of your comments. You may also submit comments on the Internet at *http://dms.dot.gov*. Anyone can find and read the comments received in this docket, including the name, address and any other personal information placed in the docket by a commenter. You may review the public docket containing any comments received and this direct final rule in person at the Dockets Office between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is located on the plaza level of the Department of Transportation NASSIF Building at the street address stated previously.

An informal docket may also be examined during normal business hours at the office of the Air Traffic Division, Airspace Branch, Federal Aviation Administration, Southwest Region, 2601 Meacham Boulevard, Fort Worth, TX. Call the manager, Airspace Branch, ASW–520, telephone (817) 222–5520; fax (817) 222–5981, to make arrangements for your visit.

FOR FURTHER INFORMATION CONTACT: Joseph R. Yadouga, Air Traffic Division, Airspace Branch, Federal Aviation Administration, Southwest Region, Fort Worth, TX 76193–0520; telephone: (817) 222–5597.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR part 71 establishes a Class E airspace area extending upward from 700 feet above the surface of Santa Teresa, NM in conjunction with the Dona Ana County Airport for which a new standard instrument approach has been prescribed and will be published in paragraph 6005 of FAA Order 7400.9M, dated August 30, 2004, and effective September 16, 2004, which is incorporated by reference in 14 CFR 71.1.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in an adverse or negative comment, and, therefore, issues it as a direct final rule. The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of an intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Although this action is in the form of a direct final rule, and was not preceded by a notice of proposed rulemaking, interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications must identify both docket numbers. All communications received on or before the closing date for comments will be considered, and this rule may be amended or withdrawn in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this action will be filed in the Rules Docket.

Agency Findings

This rule does not have federalism implications, as defined in Executive Order No. 13132, because it does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the FAA has not consulted with state authorities prior to publication of this rule.

The FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments. For the reasons discussed, I certify that this regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as these routine matters will only affect air traffic procedures and air

navigation. I certify that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

n Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration amends part 71 of the Federal Aviation Regulations (14 CFR part 71) as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

n 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

n 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9M, Airspace Designations and Reporting Points, dated August 30, 2004, and effective September 16, 2004, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ASW NM E5 Santa Teresa, NM [New]

Dona Ana County Airport, NM
Lat. 31°52′51.55″ N, Long. 106°42′17.33″ W.

That airspace extending upward from 700 feet above the surface within a 12.85-mile radius of the Dona Ana County, Santa Teresa, NM.

* * * * *

Issued in Fort Worth, TX, on August 18, 2005.

Samuel J. Gill, Jr.,

Acting Area Director, Central En Route and Oceanic Operations.

[FR Doc. 05–16924 Filed 8–24–05; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2005–21005; Airspace Docket No. 05–AWP–2]

Establishment of Class E Airspace; Marana Regional Airport, AZ

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes a Class E airspace area at Marana Regional Airport, AZ. The establishment of an Area Navigation (RNAV) Global Positioning System (GPS) Instrument Approach Procedures (IAP) RNAV (GPS) Runway (RWY) 3, 12, 21 and 30 IAP and a Nondirectional Radio Beacon (NDB) IAP to RWY 12 at Marana Regional Airport, Tucson, AZ has made this action necessary. Additional controlled airspace extending upward from 700 feet or more above the surface of the earth is needed to contain aircraft executing these RNAV (GPS) and NDB approach procedures. The intended effect of this action is to provide adequate controlled airspace for Instrument Flight Rules operations at Marana Regional Airport, Tucson, AZ.

EFFECTIVE DATE: 0901 UTC October 27, 2005.

FOR FURTHER INFORMATION CONTACT: The Office of the Regional Western Terminal Operations, Federal Aviation Administration, at 15000 Aviation Boulevard, Lawndale, California 90261, telephone (310) 725–6613.

SUPPLEMENTARY INFORMATION:

History

On June 8, 2005, the FAA proposed to amend 14 CFR parts 71 by modifying the Class E airspace area at Marana Regional Airport, AZ (05 FR 11326). Additional controlled airspace extending upward from 700 feet or more above the surface is needed to contain aircraft executing the RNAV (GPS) RWY 3, 12, 21 and 30 IAP and a Nondirectional Radio Beacon (NDB) IAP to RWY 12 at Marana Regional Airport, Tucson, AZ. This action will provide adequate controlled airspace for aircraft executing the RNAV (GPS) RWY 3, 12, 21 and 30 IAP and NDB RWY 12 IAP at Marana Regional Airport, Tucson, AZ.

Interested parties were invited to participate in this rulemaking, proceeding by submitting written comments on the proposal to the FAA. No comments to the proposal were received. Class E airspace designations for airspace extending from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9M, dated August 30, 2004, and effective September 16, 2004, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Rule

This amendment to 14 CFR part 71 modifies the Class E airspace area at Marana Regional Airport, AZ. The establishment of a RNAV (GPS) RWY 3, 12, 21 and 30 IAP and a Nondirectional Radio Beacon (NDB) IAP to RWY 12 at Marana Regional Airport has made this action necessary. The effect of this action will provide adequate airspace for aircraft executing the RNAV (GPS) RWY 3, 12, 21 and 30 IAP and NDB RWY 12 IAP at Marana Regional Airport, Tucson, AZ.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

n In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; ROUTES; AND REPORTING POINTS

n 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 14 CFR 11.69.

§ 71.1 [Amended]

n 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9M, Airspace Designations and Reporting Points, dated August 30, 2004, and effective September 16, 2004, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AWP AZ E5 Marana Regional, AZ [New]

Marana Regional, AZ
(Lat. 32°24′34″ N, long. 111°13′06″ W)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of the Marana Regional, excluding that portion within the Tucson Class E airspace area.

* * * * *

Issued in Los Angeles, California, on July 29, 2005.

John Clancy,

Area Director, Western Terminal Operations.

[FR Doc. 05–16926 Filed 8–24–05; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2005–22160; Airspace Docket No. 2005–ASW–12]

Modification to Class E Airspace; Ruidoso, NM

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This action modifies the Class E airspace area at Santa Elena, TX to provide adequate controlled airspace for the Instrument Landing System (ILS) standard instrument approach procedure (SIAP) at the Sierra Blanca Regional Airport (SRR).

DATES: Effective 0901 UTC, October 27, 2005.

Comments for inclusion in the Rules Docket must be received on or before September 27, 2005.

ADDRESSES: Send comments on the rule to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20490–0001. You must identify the docket number, FAA–2005–22160/Airspace Docket No. 2004–ASW–12, at the beginning of your comments. You may also submit comments on the Internet at the DOT docket Web site, *http://dms.dot.gov* or the government-wide Web site, *http://www.regulations.gov*. Anyone can find and read the comments received in this docket, including the name, address and any other personal information placed in the docket by a commenter. You may hand deliver your comments and review the public docket containing any comments received and this direct final rule in person at the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is located on the plaza level of the Department of Transportation NASSIF Building at the street address stated previously.

An informal docket may also be examined during normal business hours at the office of the Air Traffic Division, Airspace Branch, Federal Aviation Administration, Southwest Region, 2601 Meacham Boulevard, Fort Worth, TX. Call the manager, Airspace Branch, ASW–520, telephone (817) 222–5520; fax (718) 222–5981, to make arrangements for your visit.

FOR FURTHER INFORMATION CONTACT: Joseph R. Yadouga, Air Traffic Division, Airspace Branch, Federal Aviation Administration, Southwest Region, Fort Worth, TX 76193–0520; telephone: (817) 222–5597.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR part 71 modifies the Class E airspace area extending upward from 700 feet above the surface of Ruidoso, NM in conjunction with the Sierra Blanca Regional Airport for which a new standard instrument approach has been prescribed and will be published in paragraph 6005 of FAA Order 7400.9M, dated August 30, 2004, and effective September 16, 2004, which is incorporated by reference in 14 CFR 71.1.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in an adverse or negative comment, and, therefore, issues it as a direct final rule. The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of an intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Although this action is in the form of a direct final rule, and was not preceded by a notice of proposed rulemaking, interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications must identify both docket numbers. All communications received on or before the closing date for comments will be considered, and this rule may be amended or withdrawn in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this action will be filed in the Rules Docket.

Agency Findings

This rule does not have federalism implications, as defined in Executive Order No. 13132, because it does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the FAA has not consulted with state authorities prior to publication of this rule.

The FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments. For the reasons discussed, I certify that this regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) does not

warrant preparation of a Regulatory Evaluation as these routine matters will only affect air traffic procedures and air navigation. I certify that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Authority for This Rulemaking

The FAA authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103, ''Sovereignty and use of airspace.'' Under that section, the FAA is charged with developing plans and policy for the use of the navigable airspace and assigning by regulation or order the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The FAA may modify or revoke an assignment when required in the public interest. This regulation is within the scope of that authority because it is in the public interest to provide greater control of the airspace for the safety of aircraft operating in the vicinity of the newly established standard instrument approach procedure.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

n Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration amends part 71 of the Federal Aviation Regulations (14 CFR part 71) as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

n 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

n 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9M, Airspace Designations and Reporting Points, dated August 30, 2004, and effective September 16, 2004, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

ASW NM E5 Ruidoso, NM [Revised]

Sierra Blanca Regional Airport, NM
Lat. 33°27′46.30″ N, Long. 105°32′05.10″ W

That airspace extending upward from 700 feet above the surface within a 7.1-mile radius of the Sierra Blanca Airport and within 4 miles each side of the 241° bearing from the airport extending from 7.1-mile radius to 20.60 miles northeast of the Sierra Blanca Regional Airport.

* * * * *

Issued in Fort Worth, TX, on August 18, 2005.

Samuel J. Gill, Jr.,

Acting Area Director, Central En Route and Oceanic Operations.

[FR Doc. 05–16925 Filed 8–24–05; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 3

[Docket No. 2004N–0194]

Definition of Primary Mode of Action of a Combination Product

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending its combination product regulations to define ''mode of action'' (MOA) and ''primary mode of action'' (PMOA). Along with these definitions, the final rule sets forth an algorithm the agency will use to assign combination products to an agency component for regulatory oversight when the agency cannot determine with reasonable certainty which mode of action provides the most important therapeutic action of the combination product. Finally, the final rule will require a sponsor to base its recommendation of the agency component with primary jurisdiction for regulatory oversight of its combination product by using the PMOA definition and, if appropriate, the assignment algorithm. The final rule is intended to promote the public health by codifying the agency's criteria for the assignment of combination products in transparent, consistent, and predictable terms.

DATES: The regulation is effective November 23, 2005.

FOR FURTHER INFORMATION CONTACT: Leigh Hayes, Office of Combination Products (HFG–3), Food and Drug Administration, 15800 Crabbs Branch Way, suite 200, Rockville, MD 20855, 301–427–1934.

SUPPLEMENTARY INFORMATION:

I. Introduction

In the **Federal Register** of May 7, 2004 (69 FR 25527), FDA published a proposed rule that proposed to define ''mode of action'' (MOA) and ''primary mode of action'' (PMOA) (the proposed rule). Along with these definitions, the proposal set forth an algorithm the agency proposed to use to assign combination products to an agency component for regulatory oversight when the agency cannot determine with reasonable certainty which mode of action provides the most important therapeutic action of the combination product. Finally, the proposal put forth a requirement that a sponsor make its recommendation of the agency component with primary jurisdiction for regulatory oversight of its combination product by using the PMOA definition and, if appropriate, the assignment algorithm.

As set forth in part 3 (21 CFR part 3), and as described in the proposed rule, a combination product is a product comprised of any combination of a drug and a device; a device and a biological product; a biological product and a drug; or a drug, a device, and a biological product. A combination product includes: (1) A product comprised of two or more regulated components, i.e., drug/device, biological product/device, drug/biological product, or drug/device/biological product, that are physically, chemically, or otherwise combined or mixed and produced as a single entity; (2) two or more separate products packaged together in a single package or as a unit and comprised of drug and device products, device and biological products, or biological and drug products; (3) a drug, device, or biological product packaged separately that, according to its investigational plan or proposed labeling, is intended for use only with an approved individually specified drug, device, or biological product where both are required to achieve the intended use, indication, or effect and where upon approval of the proposed product the labeling of the approved product would need to be changed, e.g., to reflect a change in intended use, dosage form, strength, route of administration, or significant change in dose; or (4) any investigational drug, device, or

biological product packaged separately that, according to its proposed labeling, is for use only with another individually specified investigational drug, device, or biological product where both are required to achieve the intended use, indication, or effect.

Section 503(g) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 353(g)) requires that FDA assign a component of the agency to have primary jurisdiction for the regulation of a combination product. That assignment must be based upon a determination of the PMOA of the combination product. For example, if the primary mode of action of a combination product is that of a biological product, the product is to be assigned to the FDA component responsible for the premarket review of that biological product. FDA issued a final rule in 1991 establishing the procedures (the ''request for designation'' (RFD) process) for determining the assignment of combination products under part 3.

The Medical Device User Fee and Modernization Act of 2002 (MDUFMA) further modified section 503(g) of the act to require the establishment of an Office (Office of Combination Products) within the Office of the Commissioner. The purpose of the Office of Combination Products is to ensure the prompt assignment of combination products to agency components, the timely and effective premarket review of such products, and consistent and appropriate postmarket regulation of combination products. MDUFMA also requires the agency to review each agreement, guidance, or practice specific to the assignment of combination products to agency components, consult with stakeholders and the directors of the agency centers, and determine whether to continue in effect, modify, revise, or eliminate such agreements, guidances, or practices.

Currently, § 3.7 requires a sponsor submitting a request for designation to identify the PMOA of the combination product and recommend a lead agency component for its regulation. The PMOA of a combination product, however, is not defined in the statute or regulations, and at times may be difficult to identify. Requests for assignment of combination products are usually submitted very early in a product's development. This practice is encouraged because it allows sponsors to begin working with an agency component as early in the development process as possible. For some products, though, the PMOA of the product is not readily apparent, to either FDA or the product sponsor, at the time the request for assignment is submitted. Determining the PMOA of a combination product is also complicated for products that have two completely different modes of action, neither of which is subordinate to the other. In close cases, assignments may turn on subtle distinctions related to the determination of whether a mode of action is ''primary,'' or not. The assignment process may appear to be unpredictable when two slightly different products are assigned to different agency components based on differences in their PMOAs.

To address these concerns, to simplify the designation process for sponsors, and to enhance the transparency, predictability, and consistency of the agency's assignment of combination products, FDA is issuing this final rule to define ''mode of action'' and ''primary mode of action.'' This final rule will clarify and codify principles the agency has generally used since section 503(g) of the act was enacted in 1990.

II. Description of the Final Rule

A. Introduction

FDA is finalizing its proposal to amend its combination product regulations to create new definitions in § 3.2 of ''mode of action'' and ''primary mode of action.'' This final rule also sets forth a two-tiered assignment algorithm in § 3.4, which the agency will use to determine assignment when it cannot determine with reasonable certainty which mode of action of a combination product provides the most important therapeutic action of the product. Finally, the rule will require that sponsors base their recommendation of which agency component should have primary jurisdiction for regulatory oversight of its product on the PMOA definition and, if appropriate, the assignment algorithm.

This final rule will fulfill the statutory requirement to assign products based on their PMOA, and will use safety and effectiveness issues, as well as consistency with the regulation of similar products, to guide the assignment of products when the agency cannot determine with reasonable certainty which mode of action provides the most important therapeutic action of the combination product. It ensures that like products would be similarly assigned, and it allows new products for which the most important therapeutic action cannot be determined with reasonable certainty to be assigned to the most appropriate agency component based on the most significant safety and effectiveness issues they present. In addition, by providing a more defined framework for the assignment process, a codified definition of PMOA will further MDUFMA's requirement that the agency ensure prompt assignment of combination products. Also, by issuing this final rule, the agency adheres to MDUFMA's requirement that it review practices specific to the assignment of combination products, consult with stakeholders and center directors, and make a determination whether to modify those practices.

Not only will this final rule fulfill the objectives set forth in the preceding paragraph, it will do so in a way that remains consistent with agency practice regarding the assignment of combination products. This rulemaking will codify criteria the agency has generally used since 1990. The final rule will apply to RFD submissions received by the agency on or after its effective date.

B. Stakeholder Input Prior to Proposed Rulemaking

Before issuance of the proposed rule, FDA held public hearings on May 15, 2002, and on November 25, 2002, and a public workshop on July 8, 2003, to discuss various issues pertaining to combination products, including the assignment of products to an agency component for regulatory oversight. Stakeholders also provided a number of written comments to the dockets for these meetings, which FDA opened to further facilitate the discussion of PMOA issues. The agency received many thoughtful comments from the stakeholders who participated in those discussions, as well as from stakeholders who submitted written comments to the docket, including some pertaining to a definition of PMOA as well as others regarding the criteria for the assignment algorithm if PMOA could not be determined. The November 2002 meeting in particular addressed questions regarding assignment. Some questions raised at the meeting were:

- What factors should FDA consider in determining the PMOA of a combination product?
- In instances where the PMOA of the combination product cannot be determined with certainty, what other factors should the agency consider in assigning primary jurisdiction?
- Is there a hierarchy among these additional factors that should be considered in order to ensure adequate review and regulation (e.g., which component presents greater safety questions?)

Several common themes emerged from these comments regarding the definition of PMOA. For instance, many stakeholders felt that the agency should

base any proposed definition of PMOA on the combination product as a whole. FDA agrees, and has crafted the definition so that PMOA is based on the most important therapeutic action of the combination product as a whole. Furthermore, as detailed in the section regarding the assignment algorithm, the agency will consider the combination product as a whole when the agency cannot determine with reasonable certainty the most important therapeutic action of the product.

Another theme recurring in a number of comments concerned the intended use of the product. Several stakeholders expressed their desire that FDA construct a definition of PMOA around this concept. As further described in this document, mode of action is defined as the means by which a product achieves its intended therapeutic effect or action. For over a decade, the agency has considered in its determination of PMOA an assessment of the product's intended use, as well as its effect on the diagnosis, cure, mitigation, treatment, or prevention of disease, and its effect on the structure or function of the body. The agency intends to continue this practice, and has structured the PMOA definition to include consideration of the intended use of a combination product.

As with the definition for PMOA, several common themes emerged from the comments regarding possible criteria to be considered when the product's most important therapeutic action cannot be determined with reasonable certainty. For example, several stakeholders suggested that the agency consider similarly situated products when assigning a combination product to a lead agency component. We agree that both precedent and expertise are important when assigning a combination product to a particular agency component, and we have placed this criterion first in the algorithm's decisionmaking hierarchy. Therefore, if the agency cannot determine with reasonable certainty which mode of action provides the most important therapeutic effect, the agency will assign the combination product to the agency component that regulates combination products that present similar safety and effectiveness questions for the product as a whole.

Another factor many stakeholders asked the agency to consider when developing an assignment algorithm relates to the relative risks of a particular combination product. We agree that this is an important consideration, and take that into account with the second criterion, which considers the most significant questions of safety and effectiveness presented by a combination product. Therefore, if the agency cannot determine the most important therapeutic action of a combination product, and there is no agency component that regulates combination products that as a whole present similar safety and effectiveness questions as the combination product at issue, the agency will assign the product to the agency component with the most expertise related to the most significant questions of safety and effectiveness of the product. In situations where the new product is the first such combination product, or where another combination product exists but the intended use, design, formulation, etc. for this combination product raise different safety and effectiveness questions, FDA will assign the product to the agency component with the most expertise to evaluate the most significant safety and effectiveness issues raised by the product.

C. What are ''Mode of Action'' and ''Primary Mode of Action?''

1. Definitions

a. *Mode of action* is defined as ''the means by which a product achieves its intended therapeutic effect or action. For purposes of this definition, 'therapeutic' action or effect includes any effect or action of the combination product intended to diagnose, cure, mitigate, treat, or prevent disease, or affect the structure or any function of the body.'' Products may have a drug, biological product, or device mode of action. Because combination products are comprised of more than one type of regulated article (biological product, device, or drug), and each constituent part contributes a biological product, device, or drug mode of action, combination products will typically have more than one mode of action.

- A constituent part has a biological product mode of action if it acts by means of a virus, therapeutic serum, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic product, or analogous product applicable to the prevention, treatment, or cure of a disease or condition of human beings, as described in section 351(i) of the Public Health Service Act.
- A constituent part has a device mode of action if it meets the definition of device contained in section 201(h)(1) to (h)(3) of the act, it does not have a biological product mode of action, and it does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and is not dependent upon being metabolized for the achievement of its primary intended purposes.
- A constituent part has a drug mode of action if it meets the definition of drug contained in section 201(g)(1) of the act and it does not have a biological product or device mode of action.

b. *Primary mode of action* is defined as ''the single mode of action of a combination product that provides the most important therapeutic action of the combination product. The most important therapeutic action is the mode of action that is expected to make the greatest contribution to the overall intended therapeutic effects of the combination product.'' As with ''mode of action,'' for purposes of PMOA, ''therapeutic'' effect or action includes any effect or action of the combination product intended to diagnose, cure, mitigate, treat, or prevent disease, or affect the structure or any function of the body.

2. Assignment Algorithm

In certain cases, it is not possible for either FDA or the product sponsor to determine, at the time a request is submitted, which mode of action of a combination product provides the most important therapeutic action. Determining the PMOA of a combination product is also complicated for products where the product has two completely different modes of action, neither of which is subordinate to the other. To assign such products with as much consistency, predictability, and transparency as possible, the agency is issuing an algorithm to determine PMOA in those instances, to be codified at § 3.4(b). In those cases, the agency will assign the combination product to the agency component that regulates other combination products that present similar questions of safety and effectiveness with regard to the combination product as a whole. When there are no other combination products that present similar questions of safety and effectiveness with regard to the combination product as a whole (e.g., it is the first such combination product, or differences in its intended use, design, formulation, etc. present different safety and effectiveness questions), the agency would assign the combination product to the agency component with the most expertise to evaluate the most significant safety and effectiveness questions presented by the combination product.

III. Comments on the Proposed Rule and FDA's Responses

A. Background

FDA received comments from 17 stakeholders on the proposal, and almost all comments supported the rule in whole or in part. For example, one comment said that ''[o]verall* * * FDA's approach to primary mode of action faithfully implements the statute'' and that ''* * * FDA did a remarkable job in listening to the comments on mode of action and primary mode of action expressed by stakeholders in prior hearings.'' Another comment ''agree[d] with FDA's proposed definition of primary mode of action'' and ''praise[d] FDA for the simplicity and consistency of the proposed assignment algorithm.''

A few general themes emerged from the comments. Though generally supportive, the comments asked that FDA provide the following clarification: (1) Clarification of the role of precedent in determining a combination product's PMOA; (2) clarification of the role of intended use in determining a combination product's PMOA; (3) clarification of the status of the Intercenter Agreements established in 1991 and their role in determining a product's PMOA; and (4) more examples to show how the PMOA definition might be applied to assign an agency component with primary jurisdiction for regulatory oversight of a combination product.

After reviewing the comments, FDA made two changes to the codified portion of this rule. The differences between the language in the proposed and final rules are set forth in italics as follows:

PMOA PROPOSED RULE	PMOA FINAL RULE
3.2 (k) Mode of action is the means by which a product achieves a therapeutic effect.	3.2 (k) Mode of action is the means by which a product achieves its intended therapeutic effect or action.
3.2(m) Primary mode of action is the single mode of action of a combination product that provides the most important therapeutic action of the combination product. The most important therapeutic action is the mode of action expected to make the greatest contribution to the overall therapeutic effects of the combination product.	3.2(m) Primary mode of action is the single mode of action of a combination product that provides the most important therapeutic action of the combination product. The most important therapeutic action is the mode of action expected to make the greatest contribution to the overall intended therapeutic effects of the combination product.

The agency has included ''intended therapeutic effect'' in the MOA definition and ''overall intended therapeutic effects'' in the PMOA definition. FDA made these changes because the ''intended'' therapeutic effect is a basic premise upon which the PMOA analysis is prefaced.

B. MOA, PMOA, and the Assignment Algorithm

1. MOA Definition

(Comment 1) Two comments stated that the definitions of drug, device, and biological product MOAs meant that any product with a biological product component could never be a drug or a device. One comment was concerned that this definition will cause certain cellular and tissue-based combination products to be regulated as biological products, or impact the classification of single entity products. One comment stated that products relying on cell or gene therapy would not have a biological product MOA based on the definition provided.

(Response) ''Drug,'' ''device,'' and ''biological product'' are defined by statute, and in defining MOA, FDA implemented those statutory definitions. The statute defines biological products based on their composition rather than their effects or mechanisms of action. FDA adhered to the definition of each article as set forth in the statutes, while focusing on the factors that the statutes identify as distinct for biological products, devices, and drugs. We followed this rationale because a biological product will also meet the statutory definition of drug or device, and a device will also meet the statutory definition of drug. Without mutually exclusive definitions of MOA, based on the unique characteristics of biological products and devices, it would be difficult to identify with certainty anything but a drug mode of action, since the statutory definition of drug is the broadest definition of the three. See, for example, 21 U.S.C. 321(g)(1)(C) (drug means articles other than food intended to affect the structure or any function of the body).

Additionally, it is important to keep in mind that this construction is used only to determine a product's various modes of action to be considered in determining the PMOA. This construction does not necessarily determine how products will be regulated or the appropriate type of application for a combination product's review.

Finally, we note that cell and gene therapy components typically have a biological product MOA. For example, certain cell and gene therapy components meet the definition of an ''analogous'' product applicable to the prevention, treatment, or cure of a disease or condition of human beings, as described in section 351(i) of the PHS Act.

(Comment 2) One comment stated that FDA should clarify that the definition of MOA relates only to the definition of each individual component. The comment also provided alternative definitions for device MOA, drug MOA, and biological product MOA.

(Response) FDA agrees and clarifies that the definition of MOA relates only to the definitional status of each individual component. In addition, the comment suggested in part that FDA change ''mode of action'' to take into account a constituent part's '''intended' therapeutic * * * effect * * *.'' Because intended use is a basic tenet upon which the PMOA determination is premised, we agree, and have revised that definition accordingly. Another suggestion was that we change the word ''action'' to ''function'' in both the definition of MOA and PMOA. We have addressed that suggestion in the PMOA definition section. We have also addressed our rationale for the development of the definitions of device MOA, drug MOA, and biological product MOA in the response to comment 1 of this document.

(Comment 3) One comment stated that the proposed rule's definition of mode of action ''almost pre-supposes that a constituent part itself may be a combination of items,'' and ''a constituent part cannot itself be a combination product.''

(Response) FDA agrees and here clarifies that constituent parts are components and not, in themselves, combination products.

(Comment 4) One comment stated that the definition of MOA of constituent parts should take into account the intended use of a combination product as a whole, and should not strictly rely on statutory definitions.

(Response) FDA agrees that the intended use of a combination product is an important factor in the PMOA analysis. Therefore, we have changed the codified definition of MOA to take into account a constituent part's intended therapeutic effect or action. The MOA definition is subsumed into the PMOA definition, where we take into account the combination product as a whole: ''The most important therapeutic action is the mode of action expected to make the greatest contribution to the *overall intended* therapeutic effects of the *combination product*'' (emphasis added).

(Comment 5) One comment stated that the statutory definitions of drug, device, and biological product should be updated to take into account emerging product technologies.

(Response) Revisions of the statutory definitions of drug, device, and biological product would require congressional action and are outside the scope of this rule.

(Comment 6) One comment stated that the language used to define device mode of action was inconsistent with the language defining drug mode of action.

(Response) FDA has reviewed the definitions, and disagrees. The agency believes that the language in the definitions clearly and consistently defines biological product, device, and drug modes of action for the purposes of part 3.

2. PMOA Definition

(Comment 7) One comment suggested that FDA change the word ''action'' in the MOA and PMOA definitions to ''function.'' The comment also suggested that the term ''therapeutic'' as in ''therapeutic action'' is more commonly used in connection with drugs and biological products. Consequently, the comment stated, use of the term ''therapeutic action'' might skew jurisdictional decisions away from devices and toward drugs and biological products.

(Response) FDA declines to make that change because we believe ''action'' is a more appropriate term than ''function'' as it pertains to the MOA and PMOA definitions. The term ''action'' is intrinsic to ''primary mode of action'' and the term is therefore most closely tied to the statute.

Moreover, FDA stated in the May 2004 PMOA proposed rule that, for purposes of both the MOA and PMOA definitions, ''therapeutic'' effect or action ''includes any effect or action of the combination product intended to diagnose, cure, mitigate, treat, or prevent disease, or affect the structure or any function of the body.'' The term ''therapeutic,'' therefore, encompasses the actions or effects of drugs, biological products, and devices. As a result, the use of the term ''therapeutic action'' in the MOA and PMOA definitions will not cause jurisdictional determinations to be skewed toward drugs and biological products and away from devices.

(Comment 8) Two comments requested that FDA explain how it will determine the most important therapeutic action of a combination product.

(Response) As explained in new § 3.2(m), the most important therapeutic mode of action is the mode of action expected to make the greatest contribution to the overall intended therapeutic effects of the combination product. To make this determination, FDA would consider the intended use of the combination product as a whole, and how it achieves its overall intended therapeutic effect. Though not an exhaustive list (because each combination product presents different questions about its scientific characteristics and use), some other factors FDA would consider in determining a combination product's most important therapeutic action include: The intended therapeutic effect of each constituent part, the duration of the contribution of each constituent part toward the therapeutic effect of the product as a whole, and any data or information provided by the applicant or available in scientific literature that describe the mode of action expected to make the greatest contribution to the overall intended therapeutic effects of the combination product.

(Comment 9) One comment requested that FDA clarify the meaning of ''reasonable certainty.'' Another comment expressed concern that the standard was subject to abuse.

(Response) In general, it would be possible to determine the PMOA of a combination product with ''reasonable certainty'' when the PMOA is not in doubt among knowledgeable experts, and can be resolved to an acceptable level in the minds of those experts based on the data and information available to FDA at the time an assignment is made. FDA believes that this standard provides adequate specificity and that it will be applied appropriately, not arbitrarily.

(Comment 10) Two comments stated that the PMOA definition should include the intended use of the product as a whole. In addition, one comment stated that, assuming we include intended use of the product as a whole and are guided by precedents, the use of the ''reasonable certainty'' standard is acceptable.

(Response) As stated in the proposal, FDA reviewed the vast majority of our prior jurisdictional determinations and found that those assignments would not have changed based on the definition of PMOA finalized here. The definition set forth here is intended to clarify and codify the principles that FDA has used since 1990 in making jurisdictional assignments. FDA agrees that intended use plays an important role in the PMOA analysis. Consequently, the revised definition of MOA will read: ''*Mode of action* is the means by which a product achieves its intended therapeutic effect or action.'' The MOA definition is subsumed into the PMOA definition, where we take into account the combination product as a whole. Furthermore, we have revised the PMOA definition to include intended use as well: ''The most important therapeutic action is the mode of action expected to make the greatest contribution to the overall *intended* therapeutic effects of the combination product'' (emphasis added).

(Comment 11) One comment stated that the intended use of a product should dictate its PMOA. In turn, PMOA should determine assignment of the product to an agency component for review and regulation, as well as the regulatory authorities to be applied. This comment also stated that the algorithm should be used only when PMOA cannot be determined, and if the algorithm is used to determine the jurisdiction of the product, two applications and two separate approvals would be necessary for its review.

(Response) As described previously in this document, FDA agrees that intended use plays an integral role in the PMOA analysis, and we have revised the MOA and PMOA definitions accordingly.

However, we do not require in this rule that PMOA dictates the regulatory authorities to be applied to a combination product's review and regulation. The application of regulatory authorities to a combination product is outside the scope of this rule. The Safe Medical Devices Act of 1990 (SMDA) established a rule determining which ''persons'' would be responsible for regulating combination products. See 21

U.S.C. section 353(g)(1). This law addresses the agency component responsible for regulating a combination product, but does not address which authorities, including which application schemes, the persons identified must use to regulate the combination product.

Under this SMDA provision, the agency would decide the following: (1) Whether to recommend that a single application for the combination product be used, and if so, what kind of application should be used new drug application (NDA), abbreviated new drug application (ANDA), biologics license application (BLA), 510(k), or premarket approval application (PMA); or (2) whether to require more than one application; for example, a BLA for the biological product component, and a PMA for the device component of a combination product. (See 21 CFR 3.4(b) (''The designation of one agency component as having primary jurisdiction for the premarket review and regulation of a combination product does not preclude consultations by that component with other agency components or, in appropriate cases, the requirement by FDA of separate applications.''))

It also appears that the comment presupposes that FDA would not identify a PMOA if there are two independent modes of action. FDA disagrees. A combination product may have two independent modes of action, yet FDA still may be able to determine the product's most important therapeutic action with reasonable certainty. However, FDA's experience in evaluating combination products has shown that for a small subset of products, the most important therapeutic action is not determinable with reasonable certainty. Therefore, FDA needs a mechanism to ensure that these types of products are assigned with consistency, transparency, and predictability. Out of necessity and with the authority granted to the agency by Congress, FDA established the algorithm to accomplish these goals. Once an assignment is made under the algorithm, FDA will decide the number (one or more), and type, of applications that are necessary.

(Comment 12) One comment asked that FDA clarify whether PMOA determined designation only, or whether it also determined the controlling regulatory authorities and the degree of collaboration between Centers.

(Response) As stated in the response to Comment 11 of this document, FDA here clarifies that PMOA is determinative of assignment only.

3. Assignment Algorithm

a. *First criterion.*

(Comment 13) One comment suggested that we clarify that the term ''direct experience,'' as set forth in the proposed rule's explanation of the algorithm, is not part of the analysis at the first tier of the algorithm.

(Response) The term ''direct experience'' is not part of the codified language used to describe the first tier of the algorithm to be used when the agency is unable to determine the PMOA with reasonable certainty. FDA here clarifies that its use of the term ''direct experience'' in the proposed rule's explanation of the algorithm was simply a reference to the first criterion of the algorithm, which states that the agency will assign a combination product to the agency component that regulates other combination products that present similar questions of safety and effectiveness with regard to the combination product as a whole.

(Comment 14) One comment asked how FDA will determine whether a product presents similar safety and effectiveness questions.

(Response) FDA will consider products the agency has already reviewed as well as products that are currently under review to determine whether a product presents similar safety and effectiveness questions. Though the examples are not intended to be exhaustive, FDA includes in the response to Comment 16 of this document the types of questions that FDA may consider, as appropriate, when making the determination of whether a combination product presents questions of safety and effectiveness that are similar to questions presented by other combination products.

b. *Second criterion.*

(Comment 15) One comment suggested that our use of the term ''expertise'' might cause divisiveness within FDA and industry. The comment recommended that the focus be on safety and effectiveness issues rather than ''expertise.'' In considering the most significant safety and effectiveness questions, the comment recommended that FDA make these judgments on a case-by-case basis.

(Response) FDA agrees that the focus here should be on the most significant safety and effectiveness issues presented by a combination product. Use of the term ''expertise'' is not meant to be divisive or imply a value judgment. Instead, the ''expertise'' criterion at this level is used merely as the most appropriate means to direct the assignment of a combination product based on the most significant safety and effectiveness issues it presents when no agency component has direct experience in the review of the product as a whole. FDA also agrees with the comment that significant safety and effectiveness issues should be considered on a case-by-case basis. As with jurisdictional determinations made prior to the issuance of this rule, FDA intends to make assignments by considering the unique issues raised by each individual combination product.

(Comment 16) Three comments asked that FDA explain how it would determine the most significant safety and effectiveness issues presented by the product. One comment suggested that the preamble to the proposal implied that FDA intended to base these determinations primarily on an assessment of the product's ''relative risks.'' Another comment asked that FDA issue a guidance document to clarify the agency's determination of the most significant safety and effectiveness issues.

(Response) FDA agrees that risk is not always the driving factor in determining appropriate jurisdiction; rather it is one factor that the agency may consider.

The questions listed in this response to comment 16 of this document are intended to further illustrate the kinds of issues FDA would consider when determining the most significant safety and effectiveness questions presented by a combination product, or whether a new combination product presents similar safety and effectiveness issues as a previous product. We note that the list of factors is not all-inclusive. FDA considers its ability to continue to assess the individual characteristics of particular products to be essential. This will allow the agency to respond to technological developments, scientific understanding, factual information concerning a specific product, or the composition, mechanism of action or intended use of a particular product. As described previously in this document, the need to consider appropriate issues on a case-by-case basis was supported by some of the comments. The questions are not listed in order of importance; indeed some factors may be weighted more than others depending on various issues presented by each individual combination product.

- What is the intended use of the product?
- What is the therapeutic effect of the product as a whole?
- Does the device component incorporate a novel or complex design or have the potential for clinically significant failure modes?
- Is this a new molecular entity or new formulation?

- Has the drug previously been approved as a generic drug?
- Does the drug have a narrow therapeutic index?
- Is the biological product component a particularly fragile molecule?
- How well understood are the product's components? Is one component relatively routine, while the other presents more significant safety and effectiveness issues due to the risks it poses, its effectiveness, or novelty?
- Which component raises greater risks?
- Has either of the components been previously approved or cleared?
- Is there a new indication, route of administration or a significant change in dose or use of one of the components, or are only secondary aspects of the labeling affected?

FDA is not issuing a guidance document on this topic at this time. However, FDA will take the suggestion under advisement, and will reconsider issuance of such guidance if it becomes apparent after implementation of the final rule that more clarification is needed.

(Comment 17) One comment recommended that FDA consider the ''least burdensome'' requirements of the device provisions of the act, as well as the ''Improving Innovation in Medical Technology'' and ''Critical Path to New Medical Products'' initiatives, which are specifically intended to advance innovation of new medical technologies by, among other things, use of a variety of premarket resources and tools (e.g., early collaboration meetings, 100–day meetings, modular reviews, etc.).

(Response) As stated in the response to Comments 11 and 12 of this document, assignment only directs a product to an agency component, and does not dictate the regulatory authorities that will be used.

4. *Miscellaneous Algorithm Questions*

(Comment 18) One comment suggested that FDA add the sponsor's recommendation of assignment to the algorithm.

(Response) FDA agrees that the sponsor's recommendation of jurisdictional assignment plays a significant role in the process of making jurisdictional determinations. Indeed, the sponsor's recommendation of assignment is a required element of an RFD under § 3.7(c)(3). FDA takes into account the information provided by the sponsor as well as the sponsor's recommendation of jurisdictional assignment not only when it is necessary to use the algorithm, but also when FDA initially decides whether the PMOA of a product can be determined with reasonable certainty. We note, too, that if FDA fails to make a jurisdictional determination within 60 days, the combination product would then automatically be assigned to the agency component recommended by the sponsor. FDA believes that the final codified language, together with the regulations currently in place, adequately takes into account a sponsor's recommendation of jurisdictional assignment of its combination product.

5. Flow Chart

(Comment 19) Two comments suggested that FDA include the flow chart in a guidance rather than the final rule.

(*Response*) FDA has not included the flow chart in the codified section of the final rule. However, we believe that the flow chart is a useful tool to illustrate how the PMOA process works; therefore, we included it in the preamble of the proposed rule merely for its instructional use.

(Comment 20) One comment suggested that FDA replace the reference in the flow chart to ''an agency component with responsibility for that type of device'' by the ''agency component with responsibility for devices'' to ensure that CDRH has primary jurisdiction.

(Response) FDA included the phrasing as written because it encompasses the subsets of drugs and devices regulated by the Center for Biologics Evaluation and Research (CBER) and biological products regulated by the Center for Drug Evaluation and Research (CDER). While most devices are regulated by the Center for Devices and Radiological Health (CDRH), certain devices, such as those related to blood collection and processing, have long been regulated by CBER, and while most biological products are regulated by CBER, certain therapeutic biological products are now regulated by CDER. A drug-device combination product with a device PMOA, where the device is regulated by CBER, would be assigned to CBER. Similarly, a biological product-device combination product with a biological product PMOA, where the biological product is regulated by CDER, would be assigned to CDER.

C. Status of Intercenter Agreements

(Comment 21) Several comments asked that FDA confirm that the Intercenter Agreements (ICAs) remain viable in helping FDA determine the appropriate agency component for premarket review and regulation of products, or update the Agreements to encompass types of combination products developed after the Agreements were written in 1991.

(Response) FDA confirms that the ICAs referenced at § 3.5(a)(1) continue to provide helpful guidance related to product jurisdiction, including the assignment of some types of combination products. The ICAs were developed following the enactment of the PMOA criterion used to make assignments of combination products. Consequently, PMOA principles were used in the ICAs' development. For example, the ICA between CDER and CDRH assigns to CDRH products such as a ''device incorporating a drug component with the combination product having the primary intended purpose of fulfilling a device function.'' The premise underlying the assignment to CDRH is that the device component of such a product provides the most important therapeutic action of the product. The CDER–CDRH ICA assigns to CDER prefilled delivery systems, such as a ''device with primary purpose of delivering or aiding in the delivery of a drug and distributed containing a drug.'' The premise of this assignment to CDER is that the device's primary purpose in delivering or aiding in the delivery of a drug is subordinate to the most important therapeutic action provided by the drug product. Similarly, the ICA between CBER and CDER assigned to CDER ''combination products that consist of a biological component and a drug component where the biological component enhances the efficacy or ameliorates the toxicity of the drug product.'' The premise underlying this assignment is that the drug product provides the most important therapeutic action of the product, while the biological product has a subordinate role in enhancing such action. These principles are preserved by the definition described in this rule.

Nonetheless, the Intercenter Agreements were developed in 1991 and do not address many types of combination products developed since that time. Furthermore, we note that, although the ICAs were developed before the regulations governing good guidance practices, the Agreements constitute guidance, which is not binding. See 21 CFR 10.115(d)(1). Moreover, the ICAs describe sometimes broad categories of products, and because PMOA might vary depending on a combination product's specific characteristics and use, the ICA recommendations may not be appropriate for every single product within a broad category. FDA is actively considering whether to continue in

effect, modify, revise, or eliminate the ICAs and plans in the near future to further clarify the role of the ICAs in light of other available information, such as this rule and more recent jurisdictional information made available on the Office of Combination Products (OCP's) Internet site. FDA believes the issuance of this final rule will help clarify jurisdiction for combination products generally.

D. Role of Precedents

(Comment 22) Several comments asked that FDA clarify the role of precedent in the jurisdictional determination of a combination product.

(Response) FDA believes that precedent plays a very important role in determining the assignment of a combination product. First, the definition of PMOA finalized here is based on past practice and will preserve precedent. FDA has long considered a product's most important therapeutic action in determining the primary mode of action of a combination product and the concept of ''most important therapeutic action'' also underlies the assignments of combination products outlined in the Intercenter Agreements. In addition, the role of precedent is encompassed in the first criterion of the assignment algorithm, for use when the agency cannot determine a combination product's PMOA with reasonable certainty. That criterion directs FDA to assign a combination product to the agency component that regulates other combination products that present similar safety and effectiveness questions with regard to the product as a whole.

E. Application of Regulatory Authorities in the Review of Combination Products

(Comment 23) A few stakeholders asked FDA to clarify which good manufacturing practices and adverse event reporting authorities would apply to the regulation of a combination product. Other comments asked whether single or separate marketing applications would be appropriate for certain types of combination products, and how user fees are handled for combination products.

(Response) As explained previously in this document, this final rule applies only to the jurisdictional assignment of combination products to an agency component for review and regulatory oversight. The specific regulatory authorities to be applied to a combination product are outside the scope of this rule.

F. Review of Specific Types of Products

(Comment 24) One comment requested that FDA clarify how the rule affects general-purpose drug delivery devices. Another comment asked FDA to clarify the applicability of a particular principle described in the CDER–CDRH ICA related to unfilled drug delivery devices. The pertinent section of that ICA states that a device with the primary purpose of delivering or aiding in the delivery of a drug that is distributed without a drug (i.e., unfilled), where the drug and device would be developed and used together as a system, would be assigned to a lead Center after considering whether the drug or device had been previously approved and the dominance of the drug or device issues. A third comment asked for clarification that delivery devices that are distributed unfilled and determined not to require conforming changes to drug labeling are devices. For instance, the comment asked for clarification of the regulatory status of closed loop insulin delivery systems and catheters to deliver clot-busting drugs, which also act physically to dissolve the clot.

(Response) In order to be a combination product, a product must meet one of the definitions found in § 3.2(e). By their general nature, unfilled, general-purpose drug delivery devices typically do not meet the definition of a combination product because they are not physically combined or packaged with, or tied by labeling to a particular drug, so such products are regulated as devices. The specific types of products mentioned in comment 24 of this document could be single-entity devices as long as they are provided without the drugs, and the labeling of the drugs does not need to change to reflect their use. The assignment of delivery devices that are not combination products as defined by § 3.2(e) is outside the scope of this rule.

(Comment 25) One comment asked FDA to clarify how several variables would impact PMOA. These questions were as follows: What if the drug component is an old, generic, off-patent drug? What if the mode of administration and dosage of the drug are changed only slightly? What if the drug indication remains the same? What if only secondary aspects of drug labeling (e.g., precautions, instructions for use) change?

(Response) These questions would not affect the determination of PMOA (i.e., the most important therapeutic action of a combination product), but they are factors FDA would consider, as appropriate, at the second tier of the algorithm, when FDA assesses the most significant safety and effectiveness questions presented by the combination product.

(Comment 26) One comment stated that, without additional clarification of the role of precedents, the PMOA analysis as applied to pharmacogenomic drug/diagnostic device products might lead to uncertain results. The comment also identified a number of products and suggested that they would not be considered under the PMOA rule as precedents because historically they have not been designated as combination products. In addition, the comment expressed concern that after this rule's enactment, the device component of these types of products would no longer be reviewed separately by CDRH, as historically has been the case.

(Response) FDA has clarified the role of precedents earlier in this section of the document. With regard to the application of the PMOA analysis to pharmacogenomic drug/diagnostic device products, the comment is correct in noting that not all such products are combination products, and when they are not, the drug and device would be regulated as separate entities.

(Comment 27) One comment asked that OCP continue its role in the regulatory oversight of drug/biological product combinations, even when CDER has regulatory responsibility for both the drug and biological product components.

(Response) A drug-biological product remains a combination product even if both components are reviewed by the same Center. FDA agrees that OCP continues to have oversight responsibility, consistent with 21 USC 353(g)(4) and the regulations set forth in 21 CFR Part 3, for drug/ biological product combination products even when both the drug and biological product components are regulated by CDER. FDA's jurisdictional update on drug-biological product combination products, available at *http://www.fda.gov/oc/combination/biologic.html*, provides more information.

(Comment 28) One comment asked that over-the-counter (OTC) drug and dietary supplement combinations be classified as combination products.

(Response) Under 21 U.S.C. 353(g) and 21 CFR part 3, a combination product is a product comprised of any combination of a drug and a device; a device and a biological product; a biological product and a drug; or a drug, a device, and a biological product. Classification of OTC drug and dietary

supplement combinations is outside the scope of this rule.

(Comment 29) One comment asked that FDA clarify whether tissue-engineered products, such as human-derived fibroblasts cultured in vitro on a synthetic scaffold, are considered to be combination products.

(Response) While classification of particular products is outside the scope of this rule, we note that many tissue engineered products, such as the product described in comment 29 of this document, are comprised of biological product and device components, and therefore meet the definition of a combination product as defined in § 3.2(e).

(Comment 30) One comment asked FDA to note that the review timelines of combination products would be consistent with the performance goals of the primary review Center. Another comment asked FDA to address the review timelines for a combination product in which the agency has required that the sponsor submit separate marketing applications.

(Response) Review timelines are outside the scope of this rule. We note that review timeframes are associated with the type of marketing application, rather than the reviewing Center. Further information on these issues, as well as other information regarding the timeliness of reviews, is discussed in FDA's guidance document on dispute resolution available at *http://www.fda.gov/oc/combination/*.

(Comment 31) One comment asked that FDA clarify how the agency would evaluate new uses for a product using the PMOA analysis.

(Response) FDA is required by statute to assign a product to an agency component for review based on its PMOA. Stakeholders have urged, and FDA agrees, that determination of a product's PMOA should take into account the product's intended use. Therefore, it is possible that a single product, intended for two different purposes, may be assigned to different agency components for review of those different uses if the PMOA for each use directs the assignment to a different agency component. However, FDA will strive to minimize the impact of these assignments where possible.

(Comment 32) One comment was concerned that the PMOA definition would direct all drug delivery devices combined with a drug product to CDER. The comment mentioned a specific example of an approved drug product in its approved container, with no change to the route of administration, combined with an innovative delivery device. Additionally, the comment stated that the same device combined with different drug products may be assigned to different divisions within CDER, which could result in confusing or conflicting requirements for the release testing or labeling of the device.

(Response) As stated previously in this document, FDA is required by statute to assign a product to an agency component for review based on its PMOA. FDA has developed a Standard Operating Procedure (SOP) to help ensure efficient and effective consultation and collaboration between the Centers on such reviews. Such consultation and collaboration will also help to ensure uniformity in approaches by the review divisions. This review process is outlined in further detail in the FDA SOP for Intercenter Consultative/Collaborative Review Process, available at *http://www.fda.gov/oc/ombudsman/intercentersop.pdf*.

Examples

(Comment 33) Several comments asked that FDA provide more examples, particularly examples illustrating how drug and biological product combination products would be reviewed. One comment recommended that FDA include examples of copackaged and cross-labeled combination products.

(Response) FDA agrees, and we provide 11 hypothetical examples in this section of the document, three of which were also provided in the proposal. We note that the interferon/ribavirin combination product is an example where the two components may be either copackaged or separately provided but labeled to be used together; the same assignment would result in either situation. In addition, we have posted a list of selected capsular descriptions illustrating many prior jurisdictional determinations, which is available on our website at *http://www.fda.gov/oc/combination/determinations.html*. FDA believes these descriptions also help to illustrate the jurisdictional determination process.

(Comment 34) One comment listed a number of hypothetical products, and asked that FDA explain how it would review and regulate them, so that stakeholders would have a better understanding of the process FDA uses when making assignments of combination products.

(Response) FDA notes that some of the comment's examples are not combination products and, therefore, fall outside the scope of the rule, while other examples lack sufficient detail for FDA to work through as a hypothetical exercise. However, FDA used or adapted some of the examples suggested and developed additional hypothetical examples. FDA believes the examples provided in this response to comment 34 of this document, along with the capsular descriptions of prior jurisdictional determinations posted on OCP's website, and the types of questions FDA considers when making assignments of combination products, further illustrate the process FDA uses when making assignments.

Examples Repeated From Proposed Rule

a. *Conventional drug-eluting stent*. A vascular stent provides a mechanical scaffold to keep a vessel open while a drug is slowly released from the stent to prevent the buildup of new tissue that would reocclude the artery.

- *PMOA Analysis—Which mode of action provides the most important therapeutic action of the combination product?*

In this case, the product has two modes of action. One action of the vascular stent is to provide a physical scaffold to be implanted in a coronary artery to improve the resultant arterial luminal diameter following angioplasty. Another action of the product is the drug action, with the intended effect of reducing the incidence of restenosis and the need for target lesion revascularization.

- *Assignment of Lead Agency Component: CDRH*

The product's primary mode of action is attributable to the device component's function of physically maintaining vessel lumen patency, while the drug plays a secondary role in reducing restenosis caused by the proliferative response to the stent implantation, augmenting the safety and/or effectiveness of the uncoated stent. Accordingly, FDA would assign the product to CDRH for regulation because the device component provides the most important therapeutic action of the product. It is unnecessary to proceed to the assignment algorithm because it is possible to determine which mode of action provides the most important therapeutic action of this particular combination product.

b. *Drug Eluting Disc*. A surgically implanted disc contains a drug that is slowly released for prolonged, local delivery of chemotherapeutic agents to a tumor site.

- *PMOA Analysis—Which mode of action provides the most important therapeutic action of the combination product?*

In this case, the product has two modes of action. This product has a device mode of action because it is surgically implanted in the body and is

designed for controlled drug release, thus affecting the structure of the body and treating disease. Another mode of action is the drug action, with the intended effect of preventing tumor recurrence at the implant site.

• *Assignment of Lead Agency Component: CDER*

Though the product has a device mode of action, the product's primary mode of action is attributable to the drug component's function of preventing tumor recurrence at the implant site. Accordingly, we would assign the product to CDER for regulation because the drug component provides the most important therapeutic action of the product. It is unnecessary to proceed to the assignment algorithm because it is possible to determine which mode of action provides the most important therapeutic action of this particular product.

c. *Contact Lens Combined With Drug to Treat Glaucoma.* In this case, a contact lens is placed in the eye to correct vision. The contact lens also contains a drug to treat glaucoma that will be delivered from the lens to the eye.

• *PMOA Analysis—Which mode of action provides the most important therapeutic action of the combination product?*

This product has two modes of action. One action of the product is the device action, to correct vision. Another action of the product is a drug action, to treat glaucoma. Though administration through a contact lens is not necessary for the drug's delivery, the combination product allows a patient requiring vision correction to receive glaucoma treatment without having to undertake a more complicated daily drug regimen. Here, both actions of the product are independent, and neither appears to be subordinate to the other.

Because it is not possible to determine which mode of action provides the greatest contribution to the overall therapeutic effects of the combination product, it is necessary to apply the assignment algorithm.

Assignment Algorithm:

• *Is there an agency component that regulates other combination products that present similar questions of safety and effectiveness with regard to the combination product as a whole?*

CDRH regulates devices intended to correct vision. CDER regulates drugs intended to treat glaucoma. In this hypothetical example, no combination product intended to treat these different conditions simultaneously has yet been submitted to the agency for review. Though both CDER and CDRH regulate products that raise similar safety and effectiveness questions with regard to the constituent parts of the product, neither agency component regulates combination products that present similar safety and effectiveness questions with regard to the product as a whole.

Because there is no agency component that regulates products that present similar safety and effectiveness questions with regard to the product as a whole, it is necessary to apply the second criterion of the algorithm.

• *Which agency component has the most expertise related to the most significant safety and effectiveness questions presented by the combination product?*

Assignment of Lead Agency Component: CDER—

Because there is no agency component that regulates combination products that present similar safety and effectiveness issues with regard to the product as a whole, the agency would consider which agency component has the most expertise related to the most significant safety and effectiveness questions presented by the product. In this hypothetical example, the most significant safety and effectiveness questions are related to the characterization, manufacturing, and clinical performance of the drug component, while the safety and effectiveness questions raised by the vision-correcting contact lens are considered more routine. It should also be noted that CDER has expertise in the review of other drugs delivered using a contact lens. Based on the application of this criterion, this product would be assigned to CDER because CDER has the most expertise related to these issues.

d. *Contact Lens Combined With Drug to Treat Glaucoma.* This product is identical to the product described in example c. in all material respects. The RFD was filed after the designation of the product in example c. Since it is not possible to determine which mode of action provides the greatest contribution to the overall therapeutic effects of the combination product, we would apply the assignment algorithm. This product would be assigned to CDER under the first criterion of the assignment algorithm, since the product described in example c. presents similar questions of safety and effectiveness with respect to the combination product as a whole and is already assigned to CDER.

Additional Examples-These hypothetical examples further illustrate the designation process.

e. *Spinal fusion device coated with a therapeutic protein intended to treat degenerative disc disease.* A spinal fusion cage soaked in a solution of a therapeutic protein to coat the inside surfaces of the device. In this hypothetical example, the fusion cage, a permanent implant, maintains the spacing and stabilizes the diseased region of the spine, while the protein is used to encourage the formation of bone within the fusion cage to further stabilize this portion of the spine as well as the cage itself.

• *PMOA Analysis—Which Mode of Action Provides the Most Important Therapeutic Action of the Combination Product?*

In this case, the product has two modes of action. One action is the device component's action to mechanically maintain the intervertrebral spacing and stabilize the diseased region of the spine. Another action is the therapeutic protein's action to encourage the formation of bone within the fusion cage to further stabilize the cage and this portion of the spine.

Assignment of Lead Agency Component: CDRH

The product's PMOA is attributable to the device component's action to mechanically maintain the intervertebral spacing and stabilize the diseased region of the spine, while the therapeutic protein's action to encourage bone formation within and around the cage plays a secondary role. In this hypothetical example, the therapeutic protein does not have the mechanical properties necessary to maintain the spacing and stabilize the spine if used alone. Furthermore, clinically successful spinal fusion, i.e., pain reduction and stability of the spine, can be achieved even in the absence of bone growth within the cage. Accordingly, FDA would assign the product to CDRH for regulation because the device component provides the most important therapeutic action of the product. It is unnecessary to proceed to the assignment algorithm because it is possible to determine which mode of action provides the most important therapeutic action of this particular combination product.

f. *Chemotherapeutic drug and monoclonal antibody for targeted cancer treatment.* The monoclonal antibody is intended to improve the drug's effectiveness by directly targeting the drug to receptors on cancer tumor cells.

• *PMOA Analysis—Which Mode of Action Provides the Most Important Therapeutic Action of the Combination Product?*

In this hypothetical case, the product has two modes of action. One action is the chemotherapeutic drug component's action to treat cancer. Another action is the monoclonal antibody's (biological

product) action to target the drug to receptors on cancer tumor cells, thereby delivering the drug directly to the tumor site.

Assignment of Lead Agency Component: CDER

The product's PMOA is attributable to the drug component's cytotoxic action on cancer cells, while the biological product component's action to target the drug to the receptors on the cancer cells enhances the efficacy of the drug. Accordingly, FDA would assign the product to CDER for regulation because the drug component provides the most important therapeutic action of the product. It is unnecessary to proceed to the assignment algorithm because it is possible to determine which mode of action provides the most important therapeutic action of this particular combination product. Note that in June 2003, FDA transferred to CDER the regulation of certain therapeutic biological products, including monoclonal antibodies, which had been regulated by CBER. Although CDER now has regulatory responsibility over both the chemotherapeutic drug and monoclonal antibody described in this hypothetical example, this example is provided for illustrative purposes. For further information about the drug and biological product consolidation, see the **Federal Register** of June 26, 2003 (68 FR 38067), and the OCP website at *http://www.fda.gov/oc/combination/transfer.html*.

g. *Scaffold seeded with autologous cells for organ replacement*. The hypothetical product has the shape of the target organ, and the autologous cells are intended to allow the product to ultimately function like the target organ in the patient.

PMOA Analysis—Which Mode of Action Provides the Most Important Therapeutic Action of the Combination Product?

In this case, the product has two modes of action. One action of the product is the action of the biological product component to help form new tissue that will ultimately function like the native organ. Another action of the product is the device component's action to provide a scaffold on which the new organ tissue will form.

Assignment of Lead Agency Component: CBER

The product's PMOA is attributable to the biological product component's action to help form new organ tissue that will ultimately function like the native organ. The device component's action to provide a scaffold upon which the new tissue will form is secondary. Though the scaffold is necessary to create the new tissue and provide the necessary shape, the creation of a functioning organ is primarily dependent upon the role of the cells to provide the tissue organization and muscular layer needed to function like the native organ. Accordingly, FDA would assign the product to CBER for regulation because the biological product component provides the most important therapeutic action of the product. It is unnecessary to proceed to the assignment algorithm because it is possible to determine which mode of action provides the most important therapeutic action of this particular combination product.

h. *Menstrual tampon impregnated with genetically modified bacteria*. The hypothetical product is intended for use throughout menstruation both in the collection of menstrual fluid and to treat and/or prevent recurrence of bacterial vaginosis.

- *PMOA Analysis—Which Mode of Action Provides the Most Important Therapeutic Action of the Combination Product?*

In this case, the product has two modes of action. One action of the product is the action of the biological product component to act upon the vaginal mucus membrane to produce antimicrobial factors that will control opportunistic pathogens. Another action of the product, like other menstrual tampons, is the device component's action to collect menstrual fluid. Here, both actions of the product are independent, and neither appears to be subordinate to the other.

Because it is not possible to determine which mode of action provides the greatest contribution to the overall therapeutic effects of the combination product, it is necessary to apply the assignment algorithm.

Assignment Algorithm:

- *Is There an Agency Component That Regulates Other Combination Products That Present Similar Questions of Safety and Effectiveness With Regard to the Combination Product as a Whole?*

CDRH regulates tampons; CBER regulates bacterial products and genetically modified cells. In this hypothetical example, no combination product intended both to collect menstrual fluid and to treat and/or prevent recurrence of bacterial vaginosis through the actions of a genetically modified organism has previously been reviewed by the agency. Though both CDRH and CBER regulate products that raise similar safety and effectiveness questions with regard to the constituent parts of the product, neither agency component regulates combination products that present similar safety and effectiveness questions with regard to the product as a whole.

Because there is no agency component that regulates products that present similar safety and effectiveness questions with regard to the product as a whole, it is necessary to apply the second criterion of the hierarchy.

- *Which Agency Component Has the Most Expertise Related to the Most Significant Safety and Effectiveness Questions Presented by the Combination Product?*

Assignment of Lead Agency Component: CBER

Because there is no agency component that regulates combination products that present similar safety and effectiveness issues with regard to the product as a whole, the agency would consider which agency component has the most expertise related to the most significant safety and effectiveness questions presented by the product. In this case, the menstrual tampon component presents generally routine safety and effectiveness questions, similar to those of other menstrual tampons. In contrast, the biological product component raises more significant safety and effectiveness questions, such as those related to bacterial strain selection and dose; bacterial purity, potency and metabolic activity, including the impact of genetic modifications; bacterial adherence potential, microbial strain interactions, and constitutive production of ancillary antimicrobial substances. Based on the application of this criterion, this product would be assigned to CBER because CBER has the most expertise related to these issues.

i. *Interferon and Ribavirin Combination Therapy*. The product is intended for use in the treatment of chronic hepatitis C. Interferon is approved under the licensing provisions of the Public Health Service Act as a stand-alone product for treatment of chronic hepatitis C. Clinical studies show that ribavirin when used alone to treat chronic hepatitis C can improve liver function, but most patients relapse with treatment of ribavirin alone. However, data show that ribavirin, when used in conjunction with interferon, produces a more efficacious response than when interferon is used alone to treat chronic hepatitis C. The drug and biological product components may be copackaged or are provided separately but cross-labeled for use together.

- *PMOA Analysis—Which Mode of Action Provides the Most Important Therapeutic Action of the Combination Product?*

In this case, the product has two modes of action. One action of the product is the action of the biological product component to treat chronic hepatitis C, which produces a dose-dependent decline in hepatitic C virus ribonucleic acid (RNA) titers. Another action of the product is the ribavirin tablet's action to enhance the efficacy of the biological product.

Assignment of Lead Agency Component: CDER

The product's PMOA is attributable to the biological product component's function, while the drug component works to enhance its efficacy. Note that interferons are now reviewed in CDER following the transfer of therapeutic biological products to CDER in 2003. CDER is now the agency component responsible for review of such biological products (see example e. in this section of the document).

j. *Implantable device with local chemotherapeutic drug.* Embolization device coated with a chemotherapeutic agent intended to treat hypervascularized tumors.

- *PMOA Analysis—Which Mode of Action Provides the Most Important Therapeutic Action of the Combination Product?*

In this case, the product has two modes of action. One action is the device component's action to physically occlude the tumor's blood supply. Another action is the drug component's action as it elutes from the device to the tumor where it has a cytotoxic effect. The embolization device is a permanent implant, while the drug component is a short-term acting chemotherapeutic.

Assignment of Lead Agency Component: CDRH

In this hypothetical example, the product's PMOA is attributable to the device component's role in the physical occlusion of the blood supply to the tumor site through embolization, while the drug component plays a subordinate role in causing apoptosis in any remaining proliferating tumor cells. In this hypothetical example, data indicate that the effectiveness of the embolization device alone for the stated indication is much greater than the effectiveness of the drug component when delivered directly to the tumor site without use of the embolization agent. Accordingly, FDA would assign the product to CDRH for regulation because the device component provides the most important therapeutic action of the product. It is unnecessary to proceed to the assignment algorithm because it is possible to determine which mode of action provides the most important therapeutic action of this particular combination product. In this hypothetical example, the PMOA was attributable to the device component. However, we note such a product used for another indication, or with another drug, could have a drug PMOA depending on the relative effectiveness of the drug and device components in providing the most important therapeutic action for the new use.

k. *Vertebroplasty Implant With Extended-Release Analgesic.* This hypothetical product is intended to provide spinal stabilization in patients with spinal bone metastases who also require palliative relief of pain.

- *PMOA Analysis—Which Mode of Action Provides the Most Important Therapeutic Action of the Combination Product?*

One action of the product is the device action, to stabilize the fractured spinal vertebral body bone. Another action of the product is the drug action, to provide for extended analgesic delivery as an alternative to oral medication in patients expected to continue to require long-term pain management despite the stabilization implant. In this hypothetical example, both actions of the product are independent, and neither is clearly subordinate to the other. Because it is not possible to determine which mode of action provides the greatest contribution to the overall therapeutic effects of the combination product, it is necessary to apply the assignment algorithm.

Is there an agency component that regulates other combination products that present similar questions of safety and effectiveness with regard to the combination product as a whole?

CDRH regulates vertebroplasty implants. CDER regulates analgesic drug products. In this hypothetical example, no product combining a vertebroplasty implant and an extended-release analgesic has yet been submitted to the agency for review, therefore neither agency component regulates combination products that present similar safety and effectiveness questions with regard to the product as a whole. Because there is no agency component that regulates products that present similar safety and effectiveness questions with regard to the product as a whole, it is necessary to apply the second criterion of the algorithm.

Which agency component has the most expertise related to the most significant safety and effectiveness questions presented by the combination product?

Assignment of Lead Agency Component: CDRH

Because there is no agency component that regulates combination products that present similar safety and effectiveness issues with regard to the product as a whole, the agency would consider which agency component has the most expertise related to the most significant safety and effectiveness questions presented by the product. Although important safety and effectiveness questions are presented by this new route of administration of an analgesic and its extended release from the device, and would need to be addressed, in this hypothetical example, the most significant safety and effectiveness questions associated with the combination product as a whole are related to the mechanical strength, wear, and clinical performance of the vertebroplasty implant. Based on the application of this criterion in the algorithm, this product would be assigned to CDRH because CDRH has the most expertise related to these issues. CDRH would consult or collaborate with CDER on the safety and effectiveness issues raised by the analgesic component.

Miscellaneous Comments

(Comment 35) Several comments asked that FDA post precedents on the Web, so that stakeholders could better understand the process FDA used when making jurisdictional determinations for combination products submitted to FDA prior to implementation of this final rule.

(Response) FDA has complied with these requests and has published a list of capsular descriptions of selected previous jurisdictional determinations, and is working to publish additional such descriptions. They are available on OCP's Web site at: *http://www.fda.gov/oc/combination/determinations.html.*

(Comment 36) A few comments suggested that FDA issue various guidances on PMOA, either before issuance of the final rule, concurrently with issuance of the final rule, or after issuance of the final rule.

(Response) FDA believes that it has provided sufficient explanation and examples, both in the preamble to the proposed and final PMOA rules and on the PMOA analysis codified here, to render additional guidance unnecessary at this time. Nonetheless, FDA will reconsider if implementation of this rule gives rise to a need for development of a guidance on this topic.

(Comment 37) One comment suggested that FDA repropose the rule after FDA issued a guidance.

(Response) FDA declines to repropose the rule. First, the majority of comments were supportive of the rule in whole or in part, and only two minor changes have been made to the codified

language. Second, the majority of stakeholders that commented in public meetings held prior to issuance of the proposal stressed to FDA the need to define PMOA and MOA in a timely manner. We have done so here in a manner that, as one comment stated, ''faithfully implements the statute.''

(Comment 38) One comment suggested that FDA withdraw the rule because it would hinder the assignment process and because the algorithm is not set forth in the statute. The comment was primarily concerned that the criteria used in the algorithm did not adequately explain how FDA would determine the most significant as well as similar safety and effectiveness questions.

(Response) FDA believes that it has adequately addressed how it will determine these issues by providing in this preamble numerous examples as well as examples of factors FDA considers when making these determinations. Additionally, we have published on the OCP Web site an extensive list of capsular descriptions of actual assignment decisions. The agency believes the issuance of this rule will not hinder the assignment process but rather improve it. FDA declines to withdraw this rule for the reasons stated in comment 38 of this document. Furthermore, FDA's experience in evaluating combination products has shown that for a small subset of products, the most important therapeutic action is not determinable with reasonable certainty, even by the product's developer. Therefore, FDA needs a mechanism to ensure that these types of products are assigned with consistency, transparency, and predictability to an appropriate agency component. Out of necessity, FDA established the algorithm to accomplish these goals.

Implementation

(Comment 39) Several comments asked FDA to clarify whether the rule would affect prior RFD determinations. One comment also asked that FDA clarify whether the final rule is intended to change prior jurisdictional decisions made outside the RFD process.

(Response) The rule is prospective in nature and will apply only to assignments FDA makes 90 days after the rule is published in the **Federal Register**. This final rule is not intended to affect RFD determinations made prior to its implementation. For prior jurisdictional assignments of combination products made outside the RFD process, FDA would consider the facts and principles governing PMOA before moving such a product to another agency component.

IV. Legal Authority

The agency derives its authority to issue the regulations found in part 3 from 21 U.S.C. 321, 351, 353, 355, 360, 360c–360f, 360h–360j, 360gg–360ss, 360bbb–2, 371(a), 379e, 381, 394; 42 U.S.C. 216, 262, and 264 as stated in the Code of Federal Regulations. Congress expressly directed FDA to assign combination products to the appropriate agency component for regulation based on the agency's assessment of PMOA as set forth in section 503(g) of the act. Under section 701 of the act (21 U.S.C. 371) and for the efficient enforcement of the act, FDA has the authority to define and codify ''mode of action'' and PMOA and to issue the assignment algorithm.

V. Environmental Impact

FDA has determined under 21 CFR 25.30(a) and (k), and 25.32(g) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VI. Paperwork Reduction Act of 1995

FDA concludes that the changes to the regulations on combination products finalized in this document are not subject to review by the Office of Management and Budget (OMB) because they do not constitute a ''collection of information'' under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The information collected under part 3 is currently approved under OMB control number 0910–0523. This proposal does not constitute an additional paperwork burden.

VII. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the proposed rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the agency has concluded that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

VIII. Analysis of Impacts

A. Introduction

FDA has examined the impacts of the final rule under Executive Order 12866, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4, 109 Stat. 48). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The final rule is not a significant regulatory action as defined by the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. No further analysis is required under the Regulatory Flexibility Act because the agency has determined that these final rule amendments have no compliance costs and will not have a significant impact on a substantial number of small entities. Therefore, the agency certifies the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $115 million, using the most current (2003) implicit price deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

B. The Rationale Behind This Final Rule

The purpose of the final rule is twofold: (1) To codify the definition of PMOA, a criterion the agency has used for more than a decade when assigning combination products to agency components for regulatory oversight; and (2) to simplify the designation process by providing a defined framework that sponsors may use when recommending and/or considering the PMOA and assignment of a combination product.

Indeed, as stated in the proposed rule, many stakeholders have requested that

the agency issue a rule defining PMOA because, without a definition of this statutory criterion, the assignment process has at times appeared to lack transparency. We believe that this final rule and its preamble address the significant concerns stakeholders have expressed regarding the assignment process, and address the significant concerns expressed in the comments to the proposal. Moreover, we have incorporated into the codified section of this final rule suggestions provided by the comments to the proposal regarding the MOA and PMOA definitions.

The codification of these principles will also simplify the designation process for sponsors. For years, a sponsor has been required to determine PMOA and make a recommendation of lead agency component for regulatory oversight of its combination product, without a codified definition of PMOA. The finalization of this rule will allow a sponsor to base its determination of PMOA and recommendation of lead agency component for regulatory oversight of its product on defined factors.

As mentioned previously in this final rule, as well as in the proposed rule, the amendments finalized here will fulfill the statutory requirement to assign products based on their PMOA, and will use safety and effectiveness issues as well as consistency with the regulation of similar products to guide the assignment of products when the agency cannot determine which mode of action provides the most important therapeutic action of a combination product. The final rule ensures that like products will be similarly assigned and regulated, and it allows new products for which the most important therapeutic action cannot be determined to be assigned to the most appropriate agency component based on the most significant safety and effectiveness issues they present. In addition, by providing a more defined framework for the assignment process, a codified definition of PMOA will further MDUFMA's requirement that the agency ensure prompt assignment of combination products. Also, by issuing this final rule, the agency furthers MDUFMA's requirement that it review practices specific to the assignment of combination products, consult with stakeholders and center directors, and make a determination whether to modify those practices.

The agency believes the final rule will have no compliance costs and poses no additional burden to industry.

List of Subjects in 21 CFR Part 3

Administrative practice and procedure, Biologics, Drugs, Medical devices.

n Therefore, under the Federal Food, Drug, and Cosmetic Act, the Public Health Service Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 3 is amended as follows:

PART 3—PRODUCT JURISDICTION

n 1. The authority citation for 21 CFR part 3 is revised to read as follows:

Authority: 21 U.S.C. 321, 351, 353, 355, 360, 360c–360f, 360h–360j, 360gg–360ss, 360bbb–2, 371(a), 379e, 381, 394; 42 U.S.C. 216, 262, 264.

n 2. Section 3.2 is amended by redesignating paragraph (k) as paragraph (l), paragraph (l) as paragraph (n), paragraph (m) as paragraph (o), paragraph (n) as paragraph (p); and by adding new paragraphs (k) and (m) to read as follows:

§ 3.2 Definitions.

* * * * *

(k) *Mode of action* is the means by which a product achieves an intended therapeutic effect or action. For purposes of this definition, ''therapeutic'' action or effect includes any effect or action of the combination product intended to diagnose, cure, mitigate, treat, or prevent disease, or affect the structure or any function of the body. When making assignments of combination products under this part, the agency will consider three types of mode of action: The actions provided by a biological product, a device, and a drug. Because combination products are comprised of more than one type of regulated article (biological product, device, or drug), and each constituent part contributes a biological product, device, or drug mode of action, combination products will typically have more than one identifiable mode of action.

(1) A constituent part has a biological product mode of action if it acts by means of a virus, therapeutic serum, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic product, or analogous product applicable to the prevention, treatment, or cure of a disease or condition of human beings, as described in section 351(i) of the Public Health Service Act.

(2) A constituent part has a device mode of action if it meets the definition of device contained in section 201(h)(1) to (h)(3) of the act, it does not have a biological product mode of action, and it does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and is not dependent upon being metabolized for the achievement of its primary intended purposes.

(3) A constituent part has a drug mode of action if it meets the definition of drug contained in section 201(g)(1) of the act and it does not have a biological product or device mode of action.

* * * * *

(m) *Primary mode of action* is the single mode of action of a combination product that provides the most important therapeutic action of the combination product. The most important therapeutic action is the mode of action expected to make the greatest contribution to the overall intended therapeutic effects of the combination product.

* * * * *

n 3. Section 3.4 is amended by redesignating paragraph (b) as paragraph (c) and by adding a new paragraph (b) to read as follows:

§ 3.4 Designated agency component.

* * * * *

(b) In some situations, it is not possible to determine, with reasonable certainty, which one mode of action will provide a greater contribution than any other mode of action to the overall therapeutic effects of the combination product. In such a case, the agency will assign the combination product to the agency component that regulates other combination products that present similar questions of safety and effectiveness with regard to the combination product as a whole. When there are no other combination products that present similar questions of safety and effectiveness with regard to the combination product as a whole, the agency will assign the combination product to the agency component with the most expertise related to the most significant safety and effectiveness questions presented by the combination product.

* * * * *

n 4. Section 3.7 is amended by revising paragraph (c)(2)(ix) and (c)(3) to read as follows:

§ 3.7 Request for designation.

* * * * *

(c) * * *

(2) * * *

(ix) Description of all known modes of action, the sponsor's identification of the single mode of action that provides the most important therapeutic action of the product, and the basis for that determination.

* * * * *

(3) The sponsor's recommendation as to which agency component should have primary jurisdiction based on the mode of action that provides the most important therapeutic action of the combination product. If the sponsor cannot determine with reasonable certainty which mode of action provides the most important therapeutic action of the combination product, the sponsor's recommendation must be based on the assignment algorithm set forth in § 3.4(b) and an assessment of the assignment of other combination products the sponsor wishes FDA to consider during the assignment of its combination product.

* * * * *

Dated: August 9, 2005.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 05–16527 Filed 8–24–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 866

[Docket No. 2005N–0263]

Medical Devices; Immunology and Microbiology Devices; Classification of Ribonucleic Acid Preanalytical Systems

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is classifying ribonucleic acid (RNA) preanalytical systems into class II (special controls). The special control that will apply to the device is the guidance document entitled ''Class II Special Controls Guidance Document: RNA Preanalytical Systems (RNA Collection, Stabilization, and Purification Systems for RT–PCR Used in Molecular Diagnostic Testing).'' The agency is classifying the device into class II (special controls) in order to provide a reasonable assurance of safety and effectiveness of the device. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a guidance document that will serve as the special control for the device.

DATES: This rule is effective September 26, 2005. The classification was effective April 18, 2005.

FOR FURTHER INFORMATION CONTACT: Uwe Scherf, Center for Devices and Radiological Health (HFZ–440), Food and Drug Administration, 2098 Gaither Rd., Rockville, MD 20850, 240–276–0496.

SUPPLEMENTARY INFORMATION:

I. What is the Background of this Rulemaking?

In accordance with section 513(f)(1) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360c(f)(1)), devices that were not in commercial distribution before May 28, 1976, the date of enactment of the Medical Device Amendments of 1976 (the amendments), generally referred to as postamendments devices, are classified automatically by statute into class III without any FDA rulemaking process. These devices remain in class III and require premarket approval, unless and until the device is classified or reclassified into class I or II, or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the act, to a predicate device that does not require premarket approval.

The agency determines whether new devices are substantially equivalent to previous marketed devices by means of premarket notification procedures in section 510(k) of the act (21 U.S.C. 360(k)) and 21 CFR part 807 of FDA's regulations.

Section 513(f)(2) of the act provides that any person who submits a premarket notification under section 510(k) of the act for a device that has not previously been classified may, within 30 days after receiving an order classifying the device in class III under section 513(f)(1) of the act, request FDA to classify the device under the criteria set forth in section 513(a)(1) of the act. FDA shall, within 60 days of receiving such a request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the **Federal Register** announcing such classification (section 513(f)(2) of the act).

In accordance with section 513(f)(1) of the act, FDA issued an order on February 18, 2005, classifying the PAXgene™ Blood RNA System into class III, because it was not substantially equivalent to a device that was introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976, or a device which was subsequently reclassified into class I or class II. On February 28, 2005, PreAnalytiX GmbH, c/o Becton, Dickinson and Co., submitted a petition requesting classification of the PAXgene™ Blood RNA System under section 513(f)(2) of the act. The manufacturer recommended that the device be classified into class II.

In accordance with 513(f)(2) of the act, FDA reviewed the petition in order to classify the device under the criteria for classification set forth in 513(a)(1) of the act. Devices are to be classified into class II if general controls, by themselves, are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls to provide reasonable assurance of the safety and effectiveness of the device for its intended use. After review of the information submitted in the petition, FDA determined that the PAXgene™ Blood RNA System can be classified into class II with the establishment of special controls. FDA believes these special controls will provide reasonable assurance of the safety and effectiveness of the device.

The device is assigned the generic name RNA Preanalytical Systems and it is identified as a device intended to collect, store, and transport patient specimens, and stabilize intracellular RNA from the specimens, for subsequent isolation and purification of the intracellular RNA for reverse transcriptase polymerase chain reaction (RT–PCR) used in in vitro molecular diagnostic testing. The device may consist of sample collection devices, nucleic acid isolation and purification reagents, and processing reagents/equipment (tubes, columns, etc.). It also may contain instruments for automation of the nucleic acid isolation and purification steps.

FDA has identified the following risks to health associated specifically with this type of device: (1) Inaccurate results and improper patient management, (2) delay in diagnosis, and (3) a need for patient specimen recollection.

Failure of the system during specimen collection, or during RNA stabilization or purification could yield an RNA sample of low quality and quantity. Low quality RNA, when tested, could result in falsely low or falsely high RNA transcript signal levels leading to inaccurate diagnosis and/or improper patient management. Low quantity of RNA could render the samples unusable for downstream RT–PCR applications; specimens would need to be recollected, causing possible delay in diagnosis. In addition, depending on specimen type, recollection could pose additional patient risk (e.g., tissue biopsy). The degree of risk varies depending on the disease or condition/stage being diagnosed or managed. Results of RNA testing should always be considered in conjunction with other clinical factors.

FDA believes that the class II special controls guidance document aids in mitigating the potential risks to health by providing recommendations on validation of performance characteristics, including RNA stability, purity, integrity, yield, repeatability, reproducibility, and suitability for use in RT–PCR assays. The guidance document also provides information on how to meet premarket (510(k)) submission requirements for the device. FDA believes that the special controls guidance document, in addition to general controls, addresses the risks to health identified previously and provides reasonable assurance of the safety and effectiveness of the device. Therefore, on April 18, 2005, FDA issued an order to the petitioner classifying the device into class II. FDA is codifying this device by adding § 866.4070.

Following the effective date of this final classification rule, any firm submitting a 510(k) premarket notification for an RNA preanalytical system will need to address the issues covered in the special controls guidance. However, the firm need only show that its device meets the recommendations of the guidance, or in some other way provides equivalent assurance of safety and effectiveness.

Section 510(m) of the act provides that FDA may exempt a class II device from the premarket notification requirements under 510(k) of the act, if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For this type of device, FDA has determined that premarket notification is necessary to provide reasonable assurance of the safety and effectiveness of the device and, therefore, the type of device is not exempt from premarket notification requirements. Persons who intend to market this type of device must submit to FDA a premarket notification, prior to marketing the device, which contains information about the RNA Preanalytical Systems they intend to market.

II. What is the Environmental Impact of This Rule?

The agency has determined under 21 CFR 25.34(b) that this action is of type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

III. What is the Economic Impact of This Rule?

FDA has examined the impacts of the final rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this final rule is not a significant regulatory action under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because classification of this device into class II will relieve manufacturers of the device of the cost of complying with the premarket approval requirements of section 515 of the act (21 U.S.C. 360e), and may permit small potential competitors to enter the marketplace by lowering their costs, the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $115 million, using the most current (2003) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

IV. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the agency has concluded that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

V. How Does This Rule Comply With the Paperwork Reduction Act of 1995?

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

VI. What References Are on Display?

The following reference has been placed on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Petition from PreAnalytiX GmbH, c/o Becton, Dickinson and Co., dated February 28, 2005.

List of Subjects in 21 CFR Part 866

Medical devices.

n Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 866 is amended as follows:

PART 866—IMMUNOLOGY AND MICROBIOLOGY DEVICES

n 1. The authority citation for 21 CFR part 866 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

n 2. Section 866.4070 is added to subpart E to read as follows:

§866.4070 RNA Preanalytical Systems.

(a) *Identification*. RNA Preanalytical Systems are devices intended to collect, store, and transport patient specimens, and stabilize intracellular RNA from the specimens, for subsequent isolation and purification of the intracellular RNA for RT–PCR used in in vitro molecular diagnostic testing.

(b) *Classification*. Class II (special controls). The special control is FDA's guidance document entitled ''Class II Special Controls Guidance Document: RNA Preanalytical Systems (RNA Collection, Stabilization and Purification System for RT–PCR Used in Molecular Diagnostic Testing).'' See § 866.1(e) for the availability of this guidance document.

Dated: August 9, 2005.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 05–16914 Filed 8–24–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9222]

RIN 1545–BD49

Guidance Under Section 951 for Determining Pro Rata Share

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 951(a) of the Internal Revenue Code (Code) that provide guidance for determining a United States shareholder's pro rata share of a controlled foreign corporation's (CFC's) subpart F income, previously excluded subpart F income withdrawn from investment in less developed countries, and previously excluded subpart F income withdrawn from foreign base company shipping operations.

DATES: *Effective Date:* These regulations are effective August 25, 2005.

Applicability Date: For dates of applicability, see § 1.951–1(e)(7).

FOR FURTHER INFORMATION CONTACT: Jeffrey L. Vinnik, (202) 622–3840 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On August 6, 2004, the IRS published in the **Federal Register** a notice of proposed rulemaking (REG–129771–04, 2004–36 I.R.B. 453) under section 951 of the Code. Written comments were received in response to the notice of proposed rulemaking. No public hearing was requested or held on the notice of proposed rulemaking. After consideration of the comments received, the proposed regulations are adopted as final regulations with the modifications discussed below. This issue of the **Federal Register** also includes a notice of proposed rulemaking (REG–129782–05) setting forth special pro rata share rules that apply to (1) a CFC with more than one class of stock which has earnings and profits and subpart F income for the taxable year that are attributable to one or more deemed dividends arising from one or more transactions described in section 304 that are part of a plan a principal purpose of which is the avoidance of Federal income taxation, and (2) a CFC with certain cumulative preferred stock outstanding that is held by one or more persons who are not U.S. taxpayers.

Summary of Public Comments and Explanation of Changes

A. Amounts Determined Under Section 956 of the Code

Section 951(a)(1) requires a United States shareholder of a CFC to include in income the amount determined under section 956 with respect to such shareholder. The proposed regulations include a conforming change to replace *increase in earnings invested in United States property* with *amount determined under section 956* to reflect statutory changes made to section 956 of the Code by the Omnibus Budget Reconciliation Act of 1993, Public Law 103–66 (107 Stat. 312). Commentators recommended that the pro rata rules for section 956 be addressed in a separate regulatory project because, after the statutory change to section 956, the section 951 pro rata rules are no longer relevant to a United States shareholder's inclusion of the amount determined under section 956.

The IRS and Treasury Department agree with this recommendation and accordingly have deleted all references to section 956 under § 1.951–(1)(e). Provisions of § 1.951–1(a) and (d) that concerned a United States shareholder's pro rata share of the CFC's increase in earnings invested in United States property have been revised and removed, respectively, to conform the regulations to the relevant post-1993 Code provisions. The IRS and Treasury Department are considering a separate regulations project regarding the amount determined under section 956.

B. One Class of Stock—Proposed § 1.951–1(e)(2)

The proposed regulations state that if a CFC for a taxable year has only one class of stock outstanding, each United States shareholder's pro rata share of such corporation's subpart F income for the taxable year is determined by allocating the CFC's earnings and profits for such year on a per-share basis. A commentator asked that this rule be modified to clarify that the relevant earnings and profits are earnings and profits for such year unreduced by distributions during the year.

The IRS and Treasury Department agree with the comment and have clarified § 1.951–1(e)(2) accordingly.

C. More Than One Class of Stock—Proposed § 1.951–1(e)(3)(i)

In general, the proposed regulations allocate subpart F income among multiple classes of stock by reference to the distributions that would be made with respect to each class if the CFC's earnings and profits for the year were distributed on the last day of the CFC's taxable year (the hypothetical distribution). A commentator expressed concern that the hypothetical-distribution rule under the proposed regulations could allocate earnings and profits to preferred stock (including, *e.g.*, preferred stock with a noncumulative dividend preference) without regard to whether or when dividends are or will be paid. The commentator recommended that the proposed regulations be amended to provide that dividend rights should not be taken into account if, as of an appropriate date, the dividends have not been paid.

The IRS and Treasury Department have considered this comment and have concluded that, if the terms of a class of preferred stock are such that an obligation to pay a dividend with respect to the stock may or may not arise during the CFC's taxable year, depending on an exercise of discretion by the CFC's board of directors or a similar governing body, then the stock should be considered to have discretionary distribution rights. In such case, the rule of § 1.951–1(e)(3)(ii) would apply. Therefore, the suggested amendment was not adopted.

A commentator recommended that, in the case of mandatorily redeemable preferred stock with cumulative dividend rights, the regulation should include an anti-abuse rule to be applied where the amount of earnings and profits required to be allocated to such stock differs substantially on a present-value basis from the amount expected to be distributed on such stock. Additionally, a commentator recommended that an anti-abuse rule could target shareholder-level agreements that are inconsistent with the economic terms of the underlying stock.

The IRS and Treasury Department agree that it is appropriate to provide a special rule for the allocation of earnings and profits to certain mandatorily redeemable cumulative preferred stock held by persons who are not U.S. taxpayers. This special rule is set forth in a notice of proposed rulemaking published in this issue of the **Federal Register** (REG–129782–05).

With respect to the comments regarding shareholder-level agreements,

while the proposed regulations are finalized without modification in respect of that comment, the IRS and Treasury Department may issue regulations in the future if needed to address those issues based on experience following the publication of these regulations.

D. Discretionary Power To Allocate Earnings to Different Classes of Stock—Proposed § 1.951–1(e)(3)(ii)(A)

The proposed regulations provide that, where the allocation of the amount of a CFC's earnings and profits for the taxable year between two or more classes of stock depends upon the exercise of discretion by the board of directors or a similar governing body of the CFC, earnings and profits shall be allocated to classes of shares with discretionary distribution rights by reference to the relative values of those classes at the time of the hypothetical distribution. Commentators suggested that the use of a value test could be complex, costly, and time consuming. They proposed an alternative facts-and-circumstances test, with the valuation approach being used as a fall back only in limited situations. At the same time, the commentators noted that stock with discretionary distribution rights generally does not appear to exist in the marketplace (apart from ordinary common stock).

The IRS and Treasury Department have considered these comments and in light of the latter comment do not believe that a value-based allocation is likely to be required in many cases. The IRS and Treasury Department are aware that valuation is a sophisticated process but believe that the interests of sound tax policy and administration are served by requiring the value-based allocation in those instances covered by these regulations.

Under the proposed regulations, in cases where the value of each of two or more classes of stock with discretionary distribution rights is *substantially the same*, the allocation of earnings and profits to each such class is made as if such classes constituted one class of stock. A commentator suggested that values should be treated as *substantially the same* for this purpose if they are within a specified percentage of one another.

The IRS and Treasury Department have considered the comment and have concluded that the existing language is sufficient for the purposes of the regulations without the need to adopt a specified percentage range. However, *Example 3* in the regulations dealing with this issue has been revised to indicate that values may be considered substantially the same even if the difference between them is more than *de minimis*.

E. Redemptions and Scope of Deemed Distributions—Proposed §§ 1.951–1(e)(3)(ii)(B) and 1.951–1(e)(4)

The proposed regulations contain a special rule that provides that no amount shall be considered to be distributed with respect to a particular class of stock to the extent that such a distribution would constitute a distribution in redemption of stock, a distribution in liquidation, or a return of capital. Commentators suggested that this rule was too broad and that stock rights resulting in deemed dividends under sections 302 or 305 of the Code should not be disregarded in situations that are unlikely to be abusive.

The IRS and Treasury Department have considered the comments and have concluded that no change is required. The hypothetical distribution mandated by section 951(a) of the Code contemplates a pro rata distribution to shareholders with respect to stock owned on the relevant date, with no disposition of the stock or change in stock rights being made at the same time. Disregarding redemptions, liquidations, or return of capital distributions for this purpose serves the objectives of these regulations without creating undue potential for unfairness or traps for the unwary. A rule that provided that some deemed dividends under sections 302 and 305 of the Code are disregarded and some are regarded could be overly complex and difficult to administer.

The term *deemed distributions* in proposed § 1.951–1(e)(4) has been changed to *hypothetical distribution* in order to conform to the language used in § 1.951–1(e)(3).

F. Dividend Arrearages—Proposed § 1.951–1(e)(3)(iv)

The proposed regulations retained the rule in existing regulations with respect to arrearages in dividends with respect to classes of preferred stock of a CFC. Specifically, the earnings and profits of the CFC for the taxable year are attributable to such arrearage only to the extent the arrearage exceeds the earnings and profits remaining from prior taxable years beginning after December 31, 1962. Commentators suggested that this rule can lead to anomalous results, particularly where cumulative preferred stock is issued when a CFC has accumulated earnings and profits. In such a case, a failure to pay dividends for some number of periods could cause the preferred stock to attract earnings and profits (and thus subpart F income) accumulated prior to the issuance of the preferred stock and thus fail to attract an appropriate share of the CFC's subpart F income. Commentators suggested that this could be addressed by allocating to dividend arrearages only earnings and profits that arise after the issuance of the preferred stock.

The IRS and Treasury Department have considered these comments and believe that such a rule is appropriate. The final regulations adopt such a rule.

G. Section 958 of the Code

Commentators suggested that a separate project was needed to address the relationship between the indirect stock ownership rules and the pro rata share inclusion rules.

The IRS and Treasury Department have considered the comment. The need for a separate regulations project of the kind suggested may be considered at a later date.

H. Effective Date

The proposed regulations were proposed to apply for taxable years of a CFC beginning on or after January 1, 2005. Commentators recommended that the regulations provide transitional effective-date guidance to taxpayers that may need to take into account backward-looking provisions of the Code or regulations regarding the allocation of earnings and profits to stock of a CFC.

The IRS and Treasury Department have considered the comment and have provided a transitional effective date rule for cases in which the application of these pro rata rules for purposes of applying a related Code section, such as section 1248 of the Code, would result in an allocation to the stock of the CFC of earnings and profits that have already been allocated to the stock for an earlier year under the prior rules of § 1.951–1(e). In that case, the prior rules will continue to apply for purposes of applying the related Code section.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these

regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Jeffrey Vinnik, Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

n Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

n **Paragraph 1.** The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

n **Par. 2.** Section 1.951–1 is amended as follows:
n 1. Revising paragraphs (a)(2)(i) and (a)(2)(iv).
n 2. Removing and reserving paragraph (d).
n 3. Revising paragraph (e), and reserving paragraphs (e)(3)(v), (e)(4)(ii) and (e)(6) *Example 9*.

The revisions read as follows:

§ 1.951–1 Amounts included in gross income of United States shareholders.

(a) * * *
(2) * * *
(i) Such shareholder's pro rata share (determined under paragraph (b) of this section) of the corporation's subpart F income (as defined in section 952) for such taxable year of the corporation,
* * * * *
(iv) The amount determined under section 956 with respect to such shareholder for such taxable year of the corporation (but only to the extent not excluded from gross income under section 959(a)(2)).
* * * * *
(d) [Reserved].
(e) *Pro rata share defined*—(1) *In general.* For purposes of paragraphs (b) and (c) of this section, a United States shareholder's pro rata share of the controlled foreign corporation's subpart F income, previously excluded subpart F income withdrawn from investment in less developed countries, or previously excluded subpart F income withdrawn from investment in foreign base company shipping operations, respectively, for any taxable year is his pro rata share determined under § 1.952–1(a), § 1.955–1(c), or § 1.955A–1(c), respectively.

(2) *One class of stock.* If a controlled foreign corporation for a taxable year has only one class of stock outstanding, each United States shareholder's pro rata share of such corporation's subpart F income or withdrawal for the taxable year under paragraph (e)(1) of this section shall be determined by allocating the controlled foreign corporation's earnings and profits on a per share basis.

(3) *More than one class of stock*—(i) *In general.* Subject to paragraphs (e)(3)(ii) through (e)(3)(v) of this section, if a controlled foreign corporation for a taxable year has more than one class of stock outstanding, the amount of such corporation's subpart F income or withdrawal for the taxable year taken into account with respect to any one class of stock for purposes of paragraph (e)(1) of this section shall be that amount which bears the same ratio to the total of such subpart F income or withdrawal for such year as the earnings and profits which would be distributed with respect to such class of stock if all earnings and profits of such corporation for such year (not reduced by actual distributions during the year) were distributed on the last day of such corporation's taxable year on which such corporation is a controlled foreign corporation (the hypothetical distribution date), bear to the total earnings and profits of such corporation for such taxable year.

(ii) *Discretionary power to allocate earnings to different classes of stock*—(A) *In general.* Subject to paragraph (e)(3)(iii) of this section, the rules of this paragraph apply for purposes of paragraph (e)(1) of this section if the allocation of a controlled foreign corporation's earnings and profits for the taxable year between two or more classes of stock depends upon the exercise of discretion by that body of persons which exercises with respect to such corporation the powers ordinarily exercised by the board of directors of a domestic corporation (discretionary distribution rights). First, the earnings and profits of the corporation are allocated under paragraph (e)(3)(i) of this section to any class or classes of stock with non-discretionary distribution rights (*e.g.*, preferred stock entitled to a fixed return). Second, the amount of earnings and profits allocated to a class of stock with discretionary distribution rights shall be that amount which bears the same ratio to the remaining earnings and profits of such corporation for such taxable year as the value of all shares of such class of stock, determined on the hypothetical distribution date, bears to the total value of all shares of all classes of stock with discretionary distribution rights of such corporation, determined on the hypothetical distribution date. For purposes of the preceding sentence, in the case where the value of each share of two or more classes of stock with discretionary distribution rights is substantially the same on the hypothetical distribution date, the allocation of earnings and profits to such classes shall be made as if such classes constituted one class of stock in which each share has the same rights to dividends as any other share.

(B) *Special rule for redemption rights.* For purposes of paragraph (e)(3)(ii)(A) of this section, discretionary distribution rights do not include rights to redeem shares of a class of stock (even if such redemption would be treated as a distribution of property to which section 301 applies pursuant to section 302(d)).

(iii) *Special allocation rule for stock with mixed distribution rights.* For purposes of paragraphs (e)(3)(i) and (e)(3)(ii) of this section, in the case of a class of stock with both discretionary and non-discretionary distribution rights, earnings and profits shall be allocated to the non-discretionary distribution rights under paragraph (e)(3)(i) of this section and to the discretionary distribution rights under paragraph (e)(3)(ii) of this section. In such a case, paragraph (e)(3)(ii) of this section will be applied such that the value used in the ratio will be the value of such class of stock solely attributable to the discretionary distribution rights of such class of stock.

(iv) *Dividend arrearages.* For purposes of paragraph (e)(3)(i) of this section, if an arrearage in dividends for prior taxable years exists with respect to a class of preferred stock of such corporation, the earnings and profits for the taxable year shall be attributed to such arrearage only to the extent such arrearage exceeds the earnings and profits of such corporation remaining from prior taxable years beginning after December 31, 1962, or the date on which such stock was issued, whichever is later.

(v) *Earnings and profits attributable to certain section 304 transactions.* [Reserved].

(4) *Scope of hypothetical distribution*—(i) *Redemption rights.* Notwithstanding the terms of any class of stock of the controlled foreign corporation or any agreement or arrangement with respect thereto, no amount shall be considered to be distributed as part of the hypothetical

distribution with respect to a particular class of stock for purposes of paragraph (e)(3) of this section to the extent that a distribution of such amount would constitute a distribution in redemption of stock (even if such redemption would be treated as a distribution of property to which section 301 applies pursuant to section 302(d)), a distribution in liquidation, or a return of capital.

(ii) *Certain cumulative preferred stock.* [Reserved].

(5) *Restrictions or other limitations on distributions*—(i) *In general.* A restriction or other limitation on distributions of earnings and profits by a controlled foreign corporation will not be taken into account, for purposes of this section, in determining the amount of earnings and profits that shall be allocated to a class of stock of the controlled foreign corporation or the amount of the United States shareholder's pro rata share of the controlled foreign corporation's subpart F income or withdrawal for the taxable year.

(ii) *Definition.* For purposes of this section, a *restriction or other limitation on distributions* includes any limitation that has the effect of limiting the allocation or distribution of earnings and profits by a controlled foreign corporation to a United States shareholder, other than currency or other restrictions or limitations imposed under the laws of any foreign country as provided in section 964(b).

(iii) *Exception for certain preferred distributions.* The right to receive periodically a fixed amount (whether determined by a percentage of par value, a reference to a floating coupon rate, a stated return expressed in terms of a certain amount of dollars or foreign currency, or otherwise) with respect to a class of stock the distribution of which is a condition precedent to a further distribution of earnings or profits that year with respect to any class of stock (not including a distribution in partial or complete liquidation) is not a restriction or other limitation on the distribution of earnings and profits by a controlled foreign corporation under paragraph (e)(5) of this section.

(iv) *Illustrative list of restrictions and limitations.* Except as provided in paragraph (e)(5)(iii) of this section, restrictions or other limitations on distributions include, but are not limited to—

(A) An arrangement that restricts the ability of the controlled foreign corporation to pay dividends on a class of shares of the corporation owned by United States shareholders until a condition or conditions are satisfied (*e.g.*, until another class of stock is redeemed);

(B) A loan agreement entered into by a controlled foreign corporation that restricts or otherwise affects the ability to make distributions on its stock until certain requirements are satisfied; or

(C) An arrangement that conditions the ability of the controlled foreign corporation to pay dividends to its shareholders on the financial condition of the controlled foreign corporation.

(6) *Examples.* The application of this section may be illustrated by the following examples:

Example 1. (i) *Facts.* FC1, a controlled foreign corporation within the meaning of section 957(a), has outstanding 100 shares of one class of stock. Corp E, a domestic corporation and a United States shareholder of FC1, within the meaning of section 951(b), owns 60 shares. Corp H, a domestic corporation and a United States shareholder of FC1, within the meaning of section 951(b), owns 40 shares. FC1, Corp E, and Corp H each use the calendar year as a taxable year. Corp E and Corp H are shareholders of FC1 for its entire 2005 taxable year. For 2005, FC1 has $100x of earnings and profits, and income of $100x with respect to which amounts are required to be included in gross income of United States shareholders under section 951(a). FC1 makes no distributions during that year.

(ii) *Analysis.* FC1 has one class of stock. Therefore, under paragraph (e)(2) of this section, FC1's earnings and profits are allocated on a per share basis. Accordingly, for the taxable year 2005, Corp E's *pro rata* share of FC1's subpart F income is $60x (60/100 x $100x) and Corp H's *pro rata* share of FC1's subpart F income is $40x (40/100 x $100x).

Example 2. (i) *Facts.* FC2, a controlled foreign corporation within the meaning of section 957(a), has outstanding 70 shares of common stock and 30 shares of 4-percent, nonparticipating, voting, preferred stock with a par value of $10x per share. The common shareholders are entitled to dividends when declared by the board of directors of FC2. Corp A, a domestic corporation and a United States shareholder of FC2, within the meaning of section 951(b), owns all of the common shares. Individual B, a foreign individual, owns all of the preferred shares. FC2 and Corp A each use the calendar year as a taxable year. Corp A and Individual B are shareholders of FC2 for its entire 2005 taxable year. For 2005, FC2 has $50x of earnings and profits, and income of $50x with respect to which amounts are required to be included in gross income of United States shareholders under section 951(a). In 2005, FC2 distributes as a dividend $12x to Individual B with respect to Individual B's preferred shares. FC2 makes no other distributions during that year.

(ii) *Analysis.* FC2 has two classes of stock, and there are no restrictions or other limitations on distributions within the meaning of paragraph (e)(5) of this section. If the total $50x of earnings were distributed on December 31, 2005, $12x would be distributed with respect to Individual B's preferred shares and the remainder, $38x, would be distributed with respect to Corp A's common shares. Accordingly, under paragraph (e)(3)(i) of this section, Corp A's *pro rata* share of FC1's subpart F income is $38x for taxable year 2005.

Example 3. (i) *Facts.* The facts are the same as in *Example 2,* except that the shares owned by Individual B are Class B common shares and the shares owned by Corp A are Class A common shares and the board of directors of FC2 may declare dividends with respect to one class of stock without declaring dividends with respect to the other class of stock. The value of the Class A common shares on the last day of FC2's 2005 taxable year is $680x and the value of the Class B common shares on that date is $300x. The board of directors of FC2 determines that FC2 will not make any distributions in 2005 with respect to the Class A and B common shares of FC2.

(ii) *Analysis.* The allocation of FC2's earnings and profits between its Class A and Class B common shares depends solely on the exercise of discretion by the board of directors of FC2. Therefore, under paragraph (e)(3)(ii)(A) of this section, the allocation of earnings and profits between the Class A and Class B common shares will depend on the value of each class of stock on the last day of the controlled foreign corporation's taxable year. On the last day of FC2's taxable year 2005, the Class A common shares had a value of $9.30x/share and the Class B common shares had a value of $10x/share. Because each share of the Class A and Class B common stock of FC2 has substantially the same value on the last day of FC2's taxable year, under paragraph (e)(3)(ii)(A) of this section, for purposes of allocating the earnings and profits of FC2, the Class A and Class B common shares will be treated as one class of stock. Accordingly, for FC2's taxable year 2005, the earnings and profits of FC2 are allocated $35x (70/100 x $50x) to the Class A common shares and $15x (30/100 x $50x) to the Class B common shares. For its taxable year 2005, Corp A's *pro rata* share of FC2's subpart F income will be $35x.

Example 4. (i) *Facts.* FC3, a controlled foreign corporation within the meaning of section 957(a), has outstanding 100 shares of Class A common stock, 100 shares of Class B common stock and 10 shares of 5-percent nonparticipating, voting preferred stock with a par value of $50x per share. The value of the Class A shares on the last day of FC3's 2005 taxable year is $800x. The value of the Class B shares on that date is $200x. The Class A and Class B shareholders each are entitled to dividends when declared by the board of directors of FC3, and the board of directors of FC3 may declare dividends with respect to one class of stock without declaring dividends with respect to the other class of stock. Corp D, a domestic corporation and a United States shareholder of FC3, within the meaning of section 951(b), owns all of the Class A shares. Corp N, a domestic corporation and a United States shareholder of FC3, within the meaning of section 951(b), owns all of the Class B shares. Corp S, a domestic corporation and a United States shareholder of FC3, within the meaning of

section 951(b), owns all of the preferred shares. FC3, Corp D, Corp N, and Corp S each use the calendar year as a taxable year. Corp D, Corp N, and Corp S are shareholders of FC3 for all of 2005. For 2005, FC3 has $100x of earnings and profits, and income of $100x with respect to which amounts are required to be included in gross income of United States shareholders under section 951(a). In 2005, FC3 distributes as a dividend $25x to Corp S with respect to the preferred shares. The board of directors of FC3 determines that FC3 will make no other distributions during that year.

(ii) *Analysis.* The distribution rights of the preferred shares are not a restriction or other limitation within the meaning of paragraph (e)(5) of this section. Pursuant to paragraph (e)(3)(i) of this section, if the total $100x of earnings were distributed on December 31, 2005, $25x would be distributed with respect to Corp S's preferred shares and the remainder, $75x would be distributed with respect to Corp D's Class A shares and Corp N's Class B shares. The allocation of that $75x between its Class A and Class B shares depends solely on the exercise of discretion by the board of directors of FC3. The value of the Class A shares ($8x/share) and the value of the Class B shares ($2x/share) are not substantially the same on the last day of FC3's taxable year 2005. Therefore for FC3's taxable year 2005, under paragraph (e)(3)(ii)(A) of this section, the earnings and profits of FC3 are allocated $60x ($800/$1,000 x $75x) to the Class A shares and $15x ($200/$1,000 x $75x) to the Class B shares. For the 2005 taxable year, Corp D's *pro rata* share of FC3's subpart F income will be $60x, Corp N's *pro rata* share of FC3's subpart F income will be $15x and Corp S's *pro rata* share of FC3's subpart F income will be $25x.

Example 5. (i) *Facts.* FC4, a controlled foreign corporation within the meaning of section 957(a), has outstanding 40 shares of participating, voting, preferred stock and 200 shares of common stock. The owner of a share of preferred stock is entitled to an annual dividend equal to 0.5-percent of FC4's retained earnings for the taxable year and also is entitled to additional dividends when declared by the board of directors of FC4. The common shareholders are entitled to dividends when declared by the board of directors of FC4. The board of directors of FC4 has discretion to pay dividends to the participating portion of the preferred shares (after the payment of the preference) and the common shares. The value of the preferred shares on the last day of FC4's 2005 taxable year is $600x ($100x of this value is attributable to the discretionary distribution rights of these shares) and the value of the common shares on that date is $400x. Corp E, a domestic corporation and United States shareholder of FC4, within the meaning of section 951(b), owns all of the preferred shares. FC5, a foreign corporation that is not a controlled foreign corporation within the meaning of section 957(a), owns all of the common shares. FC 4 and Corp E each use the calendar year as a taxable year. Corp E and FC5 are shareholders of FC4 for all of 2005. For 2005, FC4 has $100x of earnings and profits, and income of $100x with respect to which amounts are required to be included in gross income of United States shareholders under section 951(a). In 2005, FC4's retained earnings are equal to its earnings and profits. FC4 distributes as a dividend $20x to Corp E that year with respect to Corp E's preferred shares. The board of directors of FC4 determines that FC4 will not make any other distributions during that year.

(ii) *Analysis.* The non-discretionary distribution rights of the preferred shares are not a restriction or other limitation within the meaning of paragraph (e)(5) of this section. The allocation of FC4's earnings and profits between its preferred shares and common shares depends, in part, on the exercise of discretion by the board of directors of FC4 because the preferred shares are shares with both discretionary distribution rights and non-discretionary distribution rights. Paragraph (e)(3)(i) of this section is applied first to determine the allocation of earnings and profits of FC4 to the non-discretionary distribution rights of the preferred shares. If the total $100x of earnings were distributed on December 31, 2005, $20x would be distributed with respect to the non-discretionary distribution rights of Corp E's preferred shares. Accordingly, $20x would be allocated to such shares under paragraphs (e)(3)(i) and (iii) of this section. The remainder, $80x, would be allocated under paragraph (e)(3)(ii)(A) and (e)(3)(iii) of this section between the preferred and common shareholders by reference to the value of the discretionary distribution rights of the preferred shares and the value of the common shares. Therefore, the remaining $80x of earnings and profits of FC4 are allocated $16x ($100x/$500x x $80x) to the preferred shares and $64x ($400x/$500x x $80) to the common shares. For its taxable year 2005, Corp E's *pro rata* share of FC4's subpart F income will be $36x ($20x + $16x).

Example 6. (i) *Facts.* FC6, a controlled foreign corporation within the meaning of section 957(a), has outstanding 10 shares of common stock and 400 shares of 2-percent nonparticipating, voting, preferred stock with a par value of $1x per share. The common shareholders are entitled to dividends when declared by the board of directors of FC6. Corp M, a domestic corporation and a United States shareholder of FC6, within the meaning of section 951(b), owns all of the common shares. FC7, a foreign corporation that is not a controlled foreign corporation within the meaning of section 957(a), owns all of the preferred shares. Corp M and FC7 cause the governing documents of FC6 to provide that no dividends may be paid to the common shareholders until FC6 cumulatively earns $100,000x of income. FC6 and Corp M each use the calendar year as a taxable year. Corp M and FC7 are shareholders of FC6 for all of 2005. For 2005, FC6 has $50x of earnings and profits, and income of $50x with respect to which amounts are required to be included in gross income of United States shareholders under section 951(a). In 2005, FC6 distributes as a dividend $8x to FC7 with respect to FC7's preferred shares. FC6 makes no other distributions during that year.

(ii) *Analysis.* The agreement restricting FC6's ability to pay dividends to common shareholders until FC6 cumulatively earns $100,000x of income is a restriction or other limitation, within the meaning of paragraph (e)(5) of this section, and will be disregarded for purposes of calculating Corp M's *pro rata* share of subpart F income. The non-discretionary distribution rights of the preferred shares are not a restriction or other limitation within the meaning of paragraph (e)(5) of this section. If the total $50x of earnings were distributed on December 31, 2005, $8x would be distributed with respect to FC7's preferred shares and the remainder, $42x, would be distributed with respect to Corp M's common shares. Accordingly, under paragraph (e)(3)(i) of this section, Corp M's *pro rata* share of FC6's subpart F income is $42x for taxable year 2005.

Example 7. (i) *Facts.* FC8, a controlled foreign corporation within the meaning of section 957(a), has outstanding 40 shares of common stock and 10 shares of 4-percent voting preferred stock with a par value of $50x per share. Pursuant to the terms of the preferred stock, FC8 has the right to redeem at any time, in whole or in part, the preferred stock. FP, a foreign corporation, owns all of the preferred shares. Corp G, a domestic corporation wholly owned by FP and a United States shareholder of FC8, within the meaning of section 951(b), owns all of the common shares. FC8 and Corp G each use the calendar year as a taxable year. FP and Corp G are shareholders of FC8 for all of 2005. For 2005, FC8 has $100x of earnings and profits, and income of $100x with respect to which amounts are required to be included in gross income of United States shareholder under section 951(a). In 2005, FC8 distributes as a dividend $20x to FP with respect to FP's preferred shares. FC8 makes no other distributions during that year.

(ii) *Analysis.* Pursuant to paragraph (e)(3)(ii)(B) of this section, the redemption rights of the preferred shares will not be treated as a discretionary distribution right under paragraph (e)(3)(ii)(A) of this section. Further, if FC8 were treated as having redeemed any preferred shares under paragraph (e)(3)(i) of this section, the redemption would be treated as a distribution to which section 301 applies under section 302(d) due to FP's constructive ownership of the common shares. However, pursuant to paragraph (e)(4) of this section, no amount of earnings and profits would be allocated to the preferred shareholders on the hypothetical distribution date, under paragraph (e)(3)(i) of this section, as a result of FC8's right to redeem, in whole or in part, the preferred shares. FC8's redemption rights with respect to the preferred shares cannot affect the allocation of earnings and profits between FC8's shareholders. Therefore, the redemption rights are not restrictions or other limitations within the meaning of paragraph (e)(5) of this section. Additionally, the non-discretionary distribution rights of the preferred shares are not restrictions or other limitations within the meaning of paragraph (e)(5) of this section. Therefore, if the total $100x of earnings were distributed on December 31, 2005, $20x would be distributed with respect to FP's preferred shares and the remainder, $80x, would be distributed with respect to Corp G's common

shares. Accordingly, under paragraph (e)(3)(i) of this section, Corp G's *pro rata* share of FC8's subpart F income is $80 for taxable year 2005.

Example 8. (i) *Facts.* FC9, a controlled foreign corporation within the meaning of section 957(a), has outstanding 40 shares of common stock and 60 shares of 6-percent, nonparticipating, nonvoting, preferred stock with a par value of $100x per share. Individual J, a United States shareholder of FC9, within the meaning of section 951(b), who uses the calendar year as a taxable year, owns 30 shares of the common stock, and 15 shares of the preferred stock during tax year 2005. The remaining 10 common shares and 45 preferred shares of FC9 are owned by Foreign Individual N, a foreign individual. Individual J and Individual N are shareholders of FC9 for all of 2005. For taxable year 2005, FC9 has $1,000x of earnings and profits, and income of $500x with respect to which amounts are required to be included in gross income of United States shareholders under section 951(a).

(ii) *Analysis.* The non-discretionary distribution rights of the preferred shares are not a restriction or other limitation within the meaning of paragraph (e)(5) of this section. If the total $1,000x of earnings and profits were distributed on December 31, 2005, $360x (0.06 x $100x x 60) would be distributed with respect to FC9's preferred stock and $640x ($1,000x minus $360x) would be distributed with respect to its common stock. Accordingly, of the $500x with respect to which amounts are required to be included in gross income of United States shareholders under section 951(a), $180x ($360x/$1,000x x $500x) is allocated to the outstanding preferred stock and $320x ($640x/$1,000x x $500x) is allocated to the outstanding common stock. Therefore, under paragraph (e)(3)(i) of this section, Individual J's *pro rata* share of such amounts for 2005 is $285x [($180x x 15/60)+($320x x 30/40)].

Example 9. [Reserved].

(7) *Effective dates.* This paragraph (e) applies for taxable years of a controlled foreign corporation beginning on or after January 1, 2005. However, if the application of this paragraph (e) for purposes of a related Internal Revenue Code provision, such as section 1248, results in an allocation to the stock of such corporation of earnings and profits that have already been allocated to the stock for an earlier year under the prior rules of § 1.951–1(e), as contained in 26 CFR part 1 revised April 1, 2005, then the prior rules will continue to apply to the extent necessary to avoid such duplicative allocation.

* * * * *

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: August 9, 2005.

Eric Solomon,

Acting Deputy Assistant Secretary of the Treasury.

[FR Doc. 05–16611 Filed 8–24–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 40 and 49

[TD 9221]

RIN 1545–BB75

Collected Excise Taxes; Duties of Collector

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations relating to the reporting obligations of persons that receive payments for air transportation or communications services subject to excise tax when persons liable for tax refuse to pay the tax. The final regulations affect persons that receive payments subject to tax and persons liable for those taxes.

DATES: *Effective Date:* These regulations are effective August 25, 2005.

Applicability Date: For dates of applicability, see §§ 40.6302(c)–3(g) and 49.4291–1.

FOR FURTHER INFORMATION CONTACT: Taylor Cortright, (202) 622–3130 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document amends the Excise Tax Procedural Regulations (26 CFR part 40) and the Facilities and Services Excise Tax Regulations (26 CFR part 49). On August 10, 2004, a temporary regulation (TD 9149, 60 FR 48393) was published in the **Federal Register**. A notice of proposed rulemaking (REG–163909–02, 69 FR 48432) cross-referencing the temporary regulations was published in the **Federal Register** on the same day. A written comment was received and no public hearing was requested or held. After considering the comment, the proposed regulations are adopted by this Treasury decision with clarifying changes. The corresponding temporary regulations are removed.

Special Analyses

It has been determined that these regulations are not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Taylor Cortright of the Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 40

Excise taxes, Reporting and recordkeeping requirements.

26 CFR Part 49

Excise taxes, Reporting and recordkeeping requirements, Telephone, Transportation.

Adoption of Amendments to the Regulations

n Accordingly, 26 CFR parts 40 and 49 are amended as follows:

PART 40—EXCISE TAX PROCEDURAL REGULATIONS

n **Paragraph 1.** The authority citation for part 40 is amended by removing the entry for § 40.6302(c)–3T to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

n **Par. 2.** Section 40.6302(c)–3 is amended as follows:

n 1. Paragraph (b)(2)(ii) is revised.

n 2. Paragraph (g) is amended by removing the language ''October 1, 2001'' and adding the language ''October 1, 2001, except that paragraph (b)(2)(ii)(B) of this section is applicable October 1, 2004'' in its place.

The revision reads as follows:

§ 40.6302(c)–3 Special rules for use of Government depositaries under chapter 33.

* * * * *

(b) * * *

(2) * * *

(ii) *Separate account.* The account required under paragraph (b)(2)(i)(A) of this section (the separate account)—

(A) Must reflect for each month all items of tax that are included in amounts billed or tickets sold to customers during the month;

(B) May not reflect an item of adjustment for any month during a quarter if the adjustment results from a refusal to pay or inability to collect the tax and the uncollected tax has not been reported under § 49.4291–1 of this chapter on or before the due date of the return for that quarter; and

(C) Must reflect for each month items of adjustment (including bad debts and errors) relating to the tax for prior months within the period of limitations on credits or refunds.

* * * * *

§ 40.6302(c)–3T [Removed]

n **Par. 3.** Section 40.6302(c)–3T is removed.

PART 49—FACILITIES AND SERVICES EXCISE TAXES

n **Par. 4.** The authority citation for part 49 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

n **Par. 5.** Section 49.4291–1 is amended as follows:

n 1. The fourth sentence is revised.

n 2. The fifth sentence is amended by removing the language ''this information'' and adding the language ''this report'' in its place.

n 3. A new sentence is added at the end of the paragraph.

n 4. Paragraphs (a) and (b) are added.

The revisions and addition read as follows:

§ 49.4291–1 Persons receiving payment must collect tax.

* * * Applicable October 1, 2004, this report must be made on or before the report due date. * * * For purposes of this section, the report due date is—

(a) In the case of a person using the alternative method of making deposits described in § 40.6302(c)–3 of this chapter, the due date of the return on which the item of adjustment relating to the uncollected tax would be reflected if items of adjustment were determined without regard to the limitation in § 40.6302(c)–3 of this chapter; and

(b) In any other case, the due date of the return on which the tax would have been reported but for the refusal to pay or inability to collect.

§ 49.4291–1T [Removed]

n **Par. 6.** Section 49.4291–1T is removed.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: July 20, 2005.

Eric Solomon,

Acting Deputy Secretary of the Treasury (Tax Policy).

[FR Doc. 05–16612 Filed 8–24–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF JUSTICE

28 CFR Part 16

[AAG/A Order No. 007–2005]

Privacy Act of 1974; Implementation

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice is exempting the Privacy Act system of records entitled, ''Department of Justice Regional Data Exchange System (RDEX), DOJ–012,'' from subsections (c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1), (2), (3), (5), and (8); and (g) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2). The information in this system of records relates to matters of criminal law enforcement, and the exemption is necessary in order to avoid interference with law enforcement responsibilities and functions and to protect criminal law enforcement information. The system of records document was published in the **Federal Register** on July 11, 2005 at 70 FR 39790. The proposed rule was published in the **Federal Register** on July 11, 2005 at 39696.

DATES: *Effective Date:* This final rule is effective August 25, 2005.

FOR FURTHER INFORMATION CONTACT: Mary E. Cahill, (202) 307–1823.

SUPPLEMENTARY INFORMATION: On July 11, 2005 at 70 FR 39696 a proposed rule was published in the **Federal Register** with an invitation to comment. No comments were received.

Regulatory Flexibility Act

This rule relates to individuals rather than small business entities. Nevertheless, pursuant to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601–612, it is hereby stated that this rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 28 CFR Part 16

Administrative Practices and Procedures, Courts, Freedom of Information Act, Privacy Act, and Government in Sunshine Act.

n Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a and delegated to me by Attorney General Order No. 793–78, amend 28 CFR part 16 as follows:

PART 16—[AMENDED]

Subpart E—Exemption of Records Systems under the Privacy Act

n 1. The authority for part 16 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

n 2. Section 16.133 is added to read as follows:

§ 16.133 Exemption of Department of Justice Regional Data Exchange System (RDEX), DOJ–012.

(a) The Department of Justice Regional Data Exchange System (RDEX), DOJ–012, is exempted from subsections (c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1), (2), (3), (5), and (8); and (g) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2). These exemptions apply only to the extent that information in a record is subject to exemption pursuant to 5 U.S.C. 552a(j)(2).

(b) This system is exempted from the following subsections for the reasons set forth below:

(1) From subsection (c)(3) because making available to a record subject the accounting of disclosures of criminal law enforcement records concerning him or her could inform that individual of the existence, nature, or scope of an investigation, or could otherwise seriously impede law enforcement efforts.

(2) From subsection (c)(4) because this system is exempt from subsections (d)(1), (2), (3), and (4).

(3) From subsection (d)(1) because disclosure of criminal law enforcement information could interfere with an investigation, reveal the identity of confidential sources, and result in an unwarranted invasion of the privacy of others.

(4) From subsection (d)(2) because amendment of the records would interfere with ongoing criminal law enforcement proceedings and impose an impossible administrative burden by requiring investigations to be continuously reinvestigated.

(5) From subsections (d)(3) and (4) because these subsections are inapplicable to the extent that exemption is claimed from subsections (d)(1) and (2).

(6) From subsection (e)(1) because it is often impossible to determine in advance if criminal law enforcement records contained in this system are relevant and necessary, but, in the interests of effective law enforcement, it is necessary to retain this information to aid in establishing patterns of activity and provide investigative leads.

(7) From subsection (e)(2) because collecting information from the subject individual could serve notice that he or she is the subject of a criminal law enforcement matter and thereby present a serious impediment to law enforcement efforts. Further, because of the nature of criminal law enforcement matters, vital information about an individual frequently can be obtained only from other persons who are familiar with the individual and his or her activities and it often is not practicable to rely on information provided directly by the individual.

(8) From subsection (e)(3) because informing individuals as required by this subsection could reveal the existence of a criminal law enforcement matter and compromise criminal law enforcement efforts.

(9) From subsection (e)(5) because it is often impossible to determine in advance if criminal law enforcement records contained in this system are accurate, relevant, timely, and complete, but, in the interests of effective law enforcement, it is necessary to retain this information to aid in establishing patterns of activity and obtaining investigative leads.

(10) From subsection (e)(8) because serving notice could give persons sufficient warning to evade criminal law enforcement efforts.

(11) From subsection (g) to the extent that this system is exempt from other specific subsections of the Privacy Act.

Dated: August 19, 2005.

Paul R. Corts,

Assistant Attorney General for Administration.

[FR Doc. 05–16866 Filed 8–24–05; 8:45 am]

BILLING CODE 4410–FB–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Parts 250 and 256

RIN 1010–AD16

Oil, Gas, and Sulphur Operations and Leasing in the Outer Continental Shelf (OCS)—Cost Recovery

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Final rule.

SUMMARY: MMS is changing some existing fees and implementing several new fees to offset MMS's costs of performing certain services relating to its minerals programs.

EFFECTIVE DATE: This regulation is effective as of September 26, 2005.

FOR FURTHER INFORMATION CONTACT: Angela Mazzullo, Offshore Minerals Management (OMM) Budget Office at (703) 787–1691.

SUPPLEMENTARY INFORMATION:

Background

Legal Authority and Policy Guidance: The Independent Offices Appropriation Act of 1952 (IOAA), 31 U.S.C. 9701, is a general law applicable Government-wide, that provides authority to MMS to recover the costs of providing services to the non-federal sector. It requires implementation through rulemaking. There are several policy documents that provide guidance on the process of charging applicants for service costs.

These policy documents are found in the Office of Management and Budget (OMB) Circular A–25, ''User Charges,'' and the Department of the Interior (DOI) Departmental Manual (DM), 330 DM 1.3A and 6.4, ''Cost Recovery'' and ''User Charges.'' The general policy that governs charges for services provided states that a charge ''will be assessed against each identifiable recipient for special benefits derived from federal activities beyond those received by the general public'' (OMB Circular A–25). The DOI Manual mirrors this policy (330 DM 1.3 A.). Certain activities may be exempted from these fees under certain conditions set out at 330 DM 1.3A and 6.4.4.

Cost Recovery Definition: In this rulemaking, cost recovery means reimbursement to MMS for its costs of performing a service by charging a fee to the identifiable applicant/beneficiary of the service. Further guidance is provided by Solicitor's Opinion M–36987, ''BLM's Authority to Recover Costs of Mineral Document Processing'' (December 5, 1996). The DOI Office of Inspector General issued reports in 1988 and 1995 addressing BLM's cost recovery responsibilities.

Discussion of Comments Received

MMS published a proposed rule to revise some existing fees and implement several new fees in the **Federal Register** on March 15, 2005. The comment period for the proposed rule closed on April 14, 2005. MMS received 23 sets of comments on the proposed rulemaking on 14 different issues. Respondents included: Anadarko, BP, Beacon Exploration & Production, Chevron Texaco, the Domestic Petroleum Council (DPC), EOG Resources, Exxon Mobil, the Independent Petroleum Association of America (IPAA), the International Association of Drilling Contractors (IADC), the International Association of Geophysical Contractors (IAGC), Marathon Oil, NCX Company, the National Ocean Industries Association (NOIA), the Natural Gas Supply Association (NGSA), Newfield Exploration Company, the Offshore Operators Committee (OOC), Shell Exploration & Production Company (Shell), Spinnaker Exploration, Success Energy, the U.S. Oil & Gas Association (USOGA), Waring & Associates, and WJP. These respondents raised a number of important issues that are addressed immediately below.

Issue No. 1: The comment period should be extended.

MMS received seven requests to extend the comment period beyond 30 days on the proposed rule. MMS considers this rule to be fairly straightforward and not exceptionally complex, and the fees are not significant in terms of potential economic impact. Therefore, MMS considers thirty days to be sufficient time for comment.

Issue No. 2: The implementation of the fees in this rule will discourage exploration activity on the OCS, particularly by small businesses.

MMS received five comments on this issue. MMS disagrees with the comments. The current classification of a small business by the Small Business Administration (SBA) is a company with fewer than 500 employees. Over 70 percent of companies operating on the OCS meet that criterion. Most of these companies are financially sound and payment of cost recovery fees will not affect plans for exploratory drilling. In addition, the proposed fees represent a small percentage increase in operating costs when compared to the cost of drilling a well. For example, the proposed fees range from $150–$10,700 while well drilling costs range from $5 million–$23 million.

Issue No. 3: The fees being implemented are too high. Can more information be provided as to how the fees were calculated?

MMS received seven comments on this issue. Because this rule is implementing cost recovery authority, the fees were set at what it currently costs MMS to perform these services. The following example provides greater detail of how the costs were calculated.

The Suspension of Operations/Suspension of Production (SOO/SOP) request was broken down into five sub-processes, also shown in the table below

with the associated employee's grade, time, and labor dollars.

Sub-process	Employee's grade/ step	Hours spent on task	Labor dollars
Review application.	13/3	2	$74
Perform necessary engineering, geological and/or geophysical assessment	13/3, 13/6	13	490
Attend meetings and discussions (internal and with industry)	14/5, 13/6, 13/3	6	242
Draft/review/discuss/final decision letter distribution	14/5, 13/3, 5/8	6	200
Follow-up monitoring of activity schedule deadlines	13/3	4	149
Subtotal			1,155

The labor dollars for the SOO/SOP request total $1,155. Given that this example was for the Gulf of Mexico Region (GOMR) only, the actual average benefit rate of 23.26 percent for that Region was applied, bringing the cost to $1,424. The benefit rate includes the Federal Government's share of health insurance, life insurance, retirement, and social security and Medicare. To arrive at the final fee, the bureau-wide indirect cost rate of 21.5 percent is applied, for a new total of $1,730. As explained in the preamble of the proposed rule, the indirect cost rate includes costs such as rent, equipment, telephone service, etc. This same breakdown into sub-processes was done for the other two MMS Regions with a weighted average applied to establish the fee at $1,800.

Since the same process was used to calculate all fees in this rule, and inclusion of all calculations would prove too voluminous and unwieldy, they are not included in this final rule. The preamble to the proposed rule provides greater detail on the process used to calculate all fees.

Issue No. 4: MMS is already compensated for these services from the collection of bonus bids, rentals, and royalties.

MMS received seven comments on this issue. When a lease is issued, the working interest is conveyed to the lessee(s) to whom it is issued. The government reserves a royalty interest, which is a cost free share of the production or the value of the production. Under the bidding system that is characteristic of most of the leases, the lessee pays a bonus to obtain the lease that is the result of competitive bidding. During the primary term of a lease and before the lease goes into production (in other words, during the time the lessor is not receiving any benefit from its retained royalty interest), the lessee must pay annual rentals. All of these obligations (royalties, bonus bids, and rentals) reflect the value of the lessor's (*i.e.*, the public's) property interest in the leased minerals. None of these obligations were ever intended to compensate the government for administrative costs.

Nor was the relevant mineral leasing law (the Outer Continental Shelf Lands Act (OCSLA)), which granted the Secretary the authority to issue leases, enacted as a cost recovery mechanism. The government's authority to recover certain administrative costs of the type involved in this rulemaking is granted by a statute (the provision of IOAA) that predated the OCSLA and predated every lease issued under the OCSLA. The IOAA is not related to royalty, bonus, or rental obligations.

Issue No. 5: The non-required document filing fee is too high, given that a single document can index to multiple leases, therefore multiplying the cost of a single submission.

MMS agrees. The calculation of this fee was reexamined and an inconsistency was found in the cost data collected for this service. The commenter is correct and MMS has deleted the upward fee adjustment from the rule. The non-required document filing fee will remain at $25 per lease affected. MMS also reviewed all remaining cost calculations affecting fees in this rule.

Issue No 6: MMS states that a ''Statement of Energy Effects'' is not needed, because it does not consider the rule to be a significant energy action; commenter challenges this statement.

This rule meets none of the criteria for a significant energy action. Executive Order (E.O.) 13211 defines a significant energy action:

Section 4(b): ''Significant energy action'' means any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advanced notices of proposed rulemaking, and notices of proposed rulemaking:

(1)(i) that is a significant regulatory action under E.O.12866 or any successor order; and

(ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or

(2) that is designated by the Administrator of the Office of Information and Regulatory Affairs (OIRA) as a significant energy action.

(c) ''Agency'' means any authority of the United States (U.S.) that is an ''agency'' under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5). Moreover, E.O. 12866 defines a significant regulatory action:

(f) ''Significant regulatory action'' means any regulatory action that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way; the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this E.O.

Of the above-quoted thresholds, the only one that could potentially be at issue is section (f)(3), and MMS does not believe that this rule meets that threshold. We note again that compared to the costs of drilling a well, the fees established in this rule are not significant.

Issue No. 7: The proposed rulemaking may violate the Administrative Procedure Act, because it does not disclose the basis of MMS's assessment of the costs to be recovered, other than to give description of certain generic factors purportedly considered.

See Issue No. 3 above for a more in-depth description of how the fees were calculated.

Issue No. 8: The proposed rule does not compare the proposed fees to the costs of similar services in the private sector.

To the knowledge of MMS, none of these services is offered by the private sector. Even if some of these services were offered by the private sector, the

fees are calculated based on the costs incurred by the Federal Government to provide the service. The costs of what other entities may charge for similar services are not relevant for purposes of this rule.

Issue No. 9: It is only fair that MMS not accept a processing fee for requests that are not processed through the system, but are rejected early in the evaluation due to submittal of an incomplete request. How will MMS handle the payment for these denied requests, as well as verbal approvals? Will there be any refunds? Will credit card payment be accepted?

All fees imposed by this rule are non-refundable; however, if a request is deemed not complete, an additional fee will not be charged for its resubmission. Any verbal approvals that might occur must be preceded by payment for the service. MMS is currently considering the different payment options available, and will notify lessees of the available payment options via a Notice to Lessees. The Notice will be issued before the effective date of the fees in this rule.

Issue No. 10: Commenter recommends that ''Should there be multiple lessees, all designation of operator forms shall be collected by one lessee and submitted to MMS in a single submittal subject to only one filing fee.''

MMS agrees with commenter, and that was the original intent. Section § 250.143(d) will be changed to incorporate this recommendation.

Issue No. 11: Commenter does not agree that the agency's legal authority and policy guidance require new fees or that the fees are required to fund the agency's activities.

The Solicitor's Office has determined that the Department of the Interior Manual and OMB Circular A–25 require that cost recovery action be taken whenever possible. While the structure of MMS' appropriation does not mandate collection of fees, the President's Budget assumes that MMS will collect these fees and has offset its appropriated funds accordingly.

Issue No. 12: A $10,000 fee is excessive for processing revisions, modifications or amendments to unit agreements once the original analysis conducted by MMS for the original unit application has been completed.

The commenter has misinterpreted the fee table. The proposed fee for a revision to a unit agreement is $760, while the $10,700 fee is for the original voluntary unitization proposal or the expansion of a previously approved voluntary unit to include additional acreage. To prevent further confusion the term, ''Unitization Revision and Modification'' has been changed to just ''Unitization Revision.''

Issue No. 13: Eight commenters (one consolidated letter from eight trade groups) argue that because neither existing lease terms nor regulations in effect at the time of lease issuance contain provisions allowing the new cost recovery fees, regulations imposing such fees that are promulgated after lease issuance ''are not within the scope of the contract.'' The commenter cites Mobil Exploration and Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000), as standing for the proposition that offshore leases are subject only to regulations in existence at the time of lease issuance and those promulgated thereafter that concern prevention of waste and conservation of resources.

The comment fails to acknowledge that the Independent Offices Appropriation Act, the statute under whose authority MMS is promulgating this rule, was enacted in 1952, and predates the OCS Lands Act and the leases issued under the authority of that act. The comment also misinterprets the Mobil decision. In Mobil, the Supreme Court addressed a statute enacted by Congress years after lease issuance (the Outer Banks Protection Act) whose substantive effect was to prohibit exploration of a certain class of existing leases. The Supreme Court held the statute to be a breach of contract on the part of the United States. The Supreme Court in Mobil did not address the validity of regulations at all, including regulations implementing express statutory authority already in existence. Further, contrary to the commenters' assertion, Solicitor's Opinion M–36987 is not inconsistent with the Mobil decision.

The commenters are arguing essentially that they should not be obligated to pay any costs that are not specified in the lease instrument itself. That is a policy argument that the lessees should direct to Congress, not to MMS. The commenters' policy preference does not nullify the Government's authority (or the lessee's obligations) under the IOAA when the IOAA applies to the particular administrative function involved.

Issue No. 14: Industry will be forced to pass along these new costs of doing business to consumers.

MMS is fulfilling its obligation to recover the costs. As previously discussed, the fees are insignificant in relation to the overall costs of industry to explore for and produce crude oil. It would be inappropriate for MMS to anticipate or speculate on how the industry or the market will respond to the requirement to pay for fees.

Summary of Changes to Proposed Rule

In this final rule, MMS is removing two existing fee adjustments that were proposed. Due to the inconsistency that was found in the cost data collected in relation to the non-required document filing fee adjustment, the adjustment is being removed from this rule. The current fee amount of $25 per lease affected will remain in effect.

MMS is also removing the adjustment of the Pipeline Right-of-Way (ROW) Grant Application. This fee was proposed to be lowered; however, further analysis proved that the current fee of $2,350 accurately reflects the cost to MMS to provide that service.

Further, MMS is adding language to 30 CFR 250.171 to clarify what has always been implied; to obtain a suspension, ''Your request must include:'' the four factors currently listed in § 250.171(a)–(d).

Finally, since the proposed rule was published, the bureau has updated its indirect cost rate from 15 to 21.5 percent. As required by OMB and Departmental guidance, indirect cost rates are to be included in the calculation of cost recovery fees. No specific comments addressing the indirect cost rate calculation were received. Shown below is the revised fee table.

Service	Fee amount	30 CFR citation
Change in Designation of Operator	$150	§ 250.143
Suspensions of Operations/Suspensions of Production (SOO/SOP) Request	1,800	§ 250.171
*Pipeline Right-of-Way (ROW) Grant Application	2,350	§ 250.1015
Pipeline Conversion of Lease Term to ROW	200	§ 250.1015
Pipeline ROW Assignment	170	§ 250.1018
500 feet from Lease/Unit Line Production Request	3,300	§ 250.1101
Gas Cap Production Request	4,200	§ 250.1101

Service	Fee amount	30 CFR citation
Downhole Commingling Request	4,900	§ 250.1106
Voluntary Unitization Proposal or Unit Expansion	10,700	§ 250.1303
Unitization Revision	760	§ 250.1303
Record Title/Operating Rights (Transfer)	170	§ 256.64
*Non-required Document Filing	25	§ 256.64

* Indicates no change to current amount.

Procedural Matters

Regulatory Planning and Review (E.O. 12866)

This document is not a significant rule as determined by the Office of Management and Budget (OMB) and is not subject to review under E.O. 12866.

(1) This rule will not have an annual effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This rule establishes fees based on cost recovery principles. Based on historical filings, MMS projects the fees will raise revenue by approximately $1.65 million annually.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency because the costs incurred are for specific MMS services and other agencies are not involved in these aspects of the OCS program.

(3) This rule will not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. This change will have no effect on the rights of the recipients of entitlements, grants, user fees, or loan programs. The fees established by this rule are service fees based on cost recovery, and not user fees.

(4) This rule will not raise novel legal or policy issues.

Regulatory Flexibility Act (RFA)

MMS certifies that this rule will not have a significant economic effect on a substantial number of small entities under the RFA (5 U.S.C. 601 *et seq.*).

This change will affect lessees and operators of leases in the OCS. This includes about 130 Federal oil and gas lessees and 115 holders of pipeline rights-of-way. Small lessees that operate under this rule will fall under the Small Business Administration's (SBA) North American Industry Classification System Codes (NAICS) 211111, Crude Petroleum and Natural Gas Extraction and 213111, Drilling Oil and Gas Wells. For these NAICS code classifications, a small company is one with fewer than 500 employees. Based on these criteria, an estimated 70 percent of these companies are considered small. This rule, therefore, affects a substantial number of small entities.

The fees established in the rule will not have a significant economic effect on a substantial number of small entities because the fees are very small compared to normal costs of doing business on the OCS. For example, the fees range from $150 to $10,700 while the cost of drilling a well ranges from $5 million to $23 million.

Additionally, the fees established in the rule will apply to both large and small firms in the same way. Applying for MMS services provides a benefit to the applicant (both large and small) if the applicant decides to operate in the OCS.

Comments are important. The SBA Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small business about federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you wish to comment on the actions of MMS, call 1–888–734–3247. You may comment to the SBA without fear of retaliation. Disciplinary action for retaliation by an MMS employee may include suspension or termination from employment with the DOI.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This is not a major rule under the SBREFA (5 U.S.C. 804(2)). This rule:

(a) Does not have an annual effect on the economy of $100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Leasing on the U.S. OCS is limited to residents of the U.S. or companies incorporated in the U.S. This rule does not change that requirement.

Unfunded Mandate Reform Act (UMRA) of 1995 (E.O. 12866)

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule will not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the UMRA (2 U.S.C. 1531 *et seq.*) is not required. This is because the rule will not affect State, local, or tribal governments, and the effect on the private sector is small.

Takings Implication Assessment (E.O. 12630)

With respect to E.O. 12630, the rule will not have significant takings implications. A Takings Implication Assessment is not required. The rulemaking is not a governmental action capable of interfering with constitutionally protected property rights.

Federalism (E.O. 13132)

With respect to E.O.13132, the rule will not have federalism implications. It will not substantially and directly affect the relationship between the Federal and State Governments. To the extent that State and local governments have a role in OCS activities, this change will not affect that role.

Civil Justice Reform (E.O. 12988)

With respect to E.O. 12988, the Office of the Solicitor has determined that this rule will not unduly burden the judicial system, and meets the requirements of Sections 3(a) and 3(b)(2) of the E.O.

Paperwork Reduction Act (PRA) of 1995

This rulemaking relates to 30 CFR part 250, subparts A, J, K, and M, and to 30 CFR part 256, subpart J. The rulemaking affects the information collections for these regulations but will not change the approved burden hours, just the associated fees. Therefore, OMB has determined that there is no change in the information collection and that MMS does not need to make a formal submission by Form OMB 83-I for this rulemaking. When this rule becomes effective, MMS will submit Form OMB

83–C to modify the fees in each collection.

OMB has approved the information collections for the affected regulations as 30 CFR part 250, subpart A, OMB Control Number 1010–0114 (expiration 10/31/07); subpart J, 1010–0050 (expiration 1/31/06); subpart K, 1010–0041 (expiration 7/31/06); and subpart M, 1010–0068 (expiration 8/31/05, currently in renewal); and as 30 CFR part 256, subpart J, 1010–0006, (expiration 3/31/07). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA) of 1969

The MMS has determined that this rule is administrative and involves changes addressing fee requirements. Therefore, it is categorically excluded from environmental review under section 102(2)(C) of the NEPA, pursuant to 516 DM 2.3A and 516 DM 2, Appendix 1, Item 1.10.

In addition, the rule does not meet any of the 10 criteria for exceptions to categorical exclusions listed in 516 DM 2, Appendix 2. Pursuant to Council on Environmental Quality regulations (40 CFR 1508.4) and the environmental policies and procedures of the Department of the Interior, the term ''categorical exclusions'' means categories of actions which do not individually or cumulatively have a significant effect on the human environment and which have no such effect in procedures adopted by a Federal agency and therefore require neither an environmental assessment nor an environmental impact statement.

Effects on the Nation's Energy Supply (E.O. 13211)

E.O. 13211 requires the agency to prepare a Statement of Energy Effects when it takes a regulatory action that is identified as a significant energy action. This rule is not a significant energy action, and therefore does not require a Statement of Energy Effects, because it:

(1) Is not a significant regulatory action under E.O. 12866,

(2) Is not likely to have a significant adverse effect on the supply, distribution, or use of energy, and

(3) Has not been designated by the Administrator of the OIRA, OMB, as a significant energy action.

Consultation and Coordination with Indian Tribal Governments (E.O. 13175)

In accordance with E.O. 13175, this rule will not have tribal implications that impose substantial direct compliance costs on Indian tribal governments.

Clarity of This Regulation

E.O. 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following:

(1) Are the requirements in the rule clearly stated?

(2) Does the rule contain technical language or jargon that interferes with its clarity?

(3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity?

(4) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the rule? What else can we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also e-mail the comments to this address: *Exsec@ios.doi.gov*.

List of Subjects

30 CFR Part 250

Continental shelf, Environmental impact statements, Environmental protection, Government contracts, Investigations, Mineral royalties, Oil and gas development and production, Oil and gas exploration, Oil and gas reserves, Penalties, Pipelines, Public lands-mineral resources, Public lands-rights-of-way, Reporting and recordkeeping requirements, Sulphur development and production, Sulphur exploration, Surety bonds.

30 CFR Part 256

Administrative practice and procedure, Continental shelf, Environmental protection, Government contracts, Intergovernmental relations, Minerals Management Service, Oil and gas exploration, Public lands-mineral resources, Public lands-rights-of-way, Reporting and recordkeeping requirements, Surety bonds.

Dated: August 5, 2005.

Chad Calvert,

Acting Assistant Secretary, Land and Minerals Management.

n For the reasons stated in the preamble, the Minerals Management Service (MMS) amends 30 CFR parts 250 and 256 as follows:

PART 250—OIL AND GAS AND SULPHUR OPERATIONS IN THE OUTER CONTINENTAL SHELF

n 1. Revise the authority citation for part 250 to read as follows:

Authority: 43 U.S.C. 1331 *et seq.*, 31 U.S.C. 9701.

n 2. In 30 CFR part 250, subpart A, add a new § 250.125 and add a new undesignated center heading preceding the new § 250.125 to read as follows:

Subpart A—General

* * * * *

Fees

§ 250.125 Service fees.

(a) The table in this paragraph (a) shows the fees that you must pay to MMS for the services listed. The fees will be adjusted periodically according to the Implicit Price Deflator for Gross Domestic Product by publication of a document in the **Federal Register**. If a significant adjustment is needed to arrive at the new actual cost for any reason other than inflation, then a proposed rule containing the new fees will be published in the **Federal Register** for comment.

SERVICE FEE TABLE

[Effective September 26, 2005]

Service	Fee amount	30 CFR citation
(1) Change In Designation of Operator	$150	§ 250.143
(2) Suspension of Operations/Suspension of Production (SOO/SOP) Request	1,800	§ 250.171
(3) Pipeline Right-of-Way (ROW) Grant Application	2,350	§ 250.1015
(4) Pipeline Conversion of Lease Term to ROW	200	§ 250.1015
(5) Pipeline ROW Assignment	170	§ 250.1018
(6) 500 feet from Lease/Unit Line Production Request	3,300	§ 250.1101

SERVICE FEE TABLE—Continued

[Effective September 26, 2005]

Service	Fee amount	30 CFR citation
(7) Gas Cap Production Request	4,200	§ 250.1101
(8) Downhole Commingling Request	4,900	§ 250.1106
(9) Voluntary Unitization Proposal or Unit Expansion	10,700	§ 250.1303
(10) Unitization Revision	760	§ 250.1303

(b) Once a fee is paid, it is nonrefundable, even if an application or other request is withdrawn. If your application is returned to you as incomplete, you are not required to submit a new fee with the amended application.

n 3. In § 250.143, add a new paragraph (d) to read as follows:

§ 250.143 How do I designate an operator?

* * * * *

(d) If you change the designated operator on your lease, you must pay the service fee listed in § 250.125 of this subpart with your request for a change in designation of operator. Should there be multiple lessees, all designation of operator forms must be collected by one lessee and submitted to MMS in a single submittal, which is subject to only one filing fee.

n 4. Revise § 250.171 to read as follows:

§ 250.171 How do I request a suspension?

You must submit your request for a suspension to the Regional Supervisor, and MMS must receive the request before the end of the lease term (*i.e.*, end of primary term, end of the 180-day period following the last leaseholding operation, and end of a current suspension). Your request must include:

(a) The justification for the suspension including the length of suspension requested;

(b) A reasonable schedule of work leading to the commencement or restoration of the suspended activity;

(c) A statement that a well has been drilled on the lease and determined to be producible according to §§ 250.115, 250.116, or 250.1603 (SOP only);

(d) A commitment to production (SOP only); and

(e) The service fee listed in § 250.125 of this subpart.

n 5. In § 250.1015, revise paragraph (a) to read as follows:

§ 250.1015 Applications for pipeline right-of-way grants.

(a) You must submit an original and three copies of an application for a new or modified pipeline ROW grant to the Regional Supervisor. The application must address those items required by § 250.1007(a) or (b) of this subpart, as applicable. It must also state the primary purpose for which you will use the ROW grant. If the ROW has been used before the application is made, the application must state the date such use began, by whom, and the date the applicant obtained control of the improvement. When you file your application, you must pay the rental required under § 250.1012 of this subpart, as well as the service fees listed in § 250.125 of this part for a pipeline ROW grant to install a new pipeline, or to convert an existing lease term pipeline into a ROW pipeline. An application to modify an approved ROW grant must be accompanied by the additional rental required under § 250.1012 if applicable. You must file a separate application for each ROW.

* * * * *

n 6. In § 250.1018, revise paragraph (b) to read as follows:

§ 250.1018 Assignment of pipeline right-of-way grants.

* * * * *

(b) Any application for approval for an assignment, in whole or in part, of any right, title, or interest in a right-of-way grant must be accompanied by the same showing of qualifications of the assignees as is required of an applicant for a ROW in § 250.1015 of this subpart and must be supported by a statement that the assignee agrees to comply with and to be bound by the terms and conditions of the ROW grant. The assignee must satisfy the bonding requirements in § 250.1011 of this subpart. No transfer will be recognized unless and until it is first approved, in writing, by the Regional Supervisor. The assignee must pay the service fee listed in § 250.125 of this part for a pipeline ROW assignment request.

n 7. In § 250.1101, add a new paragraph (f) to read as follows:

§ 250.1101 General requirements and classification of reservoirs.

* * * * *

(f) The lessee must pay the service fee listed in § 250.125 of this part with its request for either a 500 feet from lease/unit line production interval or to produce from a completion in an associated gas cap of a sensitive reservoir under this section.

n 8. In § 250.1106, add a new paragraph (d) to read as follows:

§ 250.1106 Downhole commingling.

* * * * *

(d) The applicant must pay the service fee listed in § 250.125 of this part with its request for downhole commingling.

n 9. In § 250.1303, add a new paragraph (d) to read as follows:

§ 250.1303 How do I apply for voluntary unitization?

* * * * *

(d) You must pay the service fee listed in § 250.125 of this part with your request for a voluntary unitization proposal or the expansion of a previously approved voluntary unit to include additional acreage. Additionally, you must pay the service fee listed in § 250.125 with your request for unitization revision.

PART 256—LEASING OF SULPHUR OR OIL AND GAS IN THE OUTER CONTINENTAL SHELF

n 10. Revise the authority citation for part 256 to read as follows:

Authority: 43 U.S.C. 1331 *et seq.*, 42 U.S.C. 6213, 31 U.S.C. 9701.

n 11. Add a new § 256.63 to read as follows:

§ 256. 63 Service fees.

(a) The table in this paragraph (a) shows the fees that you must pay to MMS for the services listed. The fees will be adjusted periodically according to the Implicit Price Deflator for Gross Domestic Product by publication of a document in the **Federal Register**. If a significant adjustment is needed to arrive at the new actual cost for any reason other than inflation, then a proposed rule containing the new fees will be published in the **Federal Register** for comment.

SERVICE FEE TABLE

[Effective September 26, 2005]

Service	Fee amount	30 CFR citation
(1) Record Title/Operating Rights (Transfer)	$170	§ 256.64
(2) Non-required Document Filing	25	§ 256.64

(b) Once a fee is paid, it is nonrefundable, even if an application or other request is withdrawn. If your application is returned to you as incomplete, you are not required to submit a new fee with the amended application.

n 12. In § 256.64, revise paragraph (a)(8) to read as follows:

§ 256.64 How to file transfers.

* * * * *

(a) * * *

(8) You must pay the service fee listed in § 256.63 of this subpart with your application for approval of any instrument of transfer you are required to file (Record Title/Operating Rights (Transfer) Fee). Where multiple transfers of interest are included in a single instrument, a separate fee applies to each individual transfer of interest. For any document you are not required to file by these regulations but which you submit for record purposes per lease affected, you must also pay the service fee listed in § 256.63 (Non-required Document Filing Fee). Such documents may be rejected at the discretion of the authorized officer.

* * * * *

[FR Doc. 05–16854 Filed 8–24–05; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08–05–025]

RIN 1625–AA09

Drawbridge Operation Regulation; Mississippi River, Rock Island, IL

AGENCY: Coast Guard, DHS.

ACTION: Temporary rule.

SUMMARY: The Coast Guard is temporarily changing the regulation governing the Rock Island Railroad & Highway Drawbridge, across the Upper Mississippi River at Mile 482.9, at Rock Island, Illinois. The drawbridge need not open for river traffic and may remain in the closed-to-navigation position from 8 a.m. to 11 a.m. on September 25, 2005. This rule allows the drawbridge be maintained in the closed-to-navigation position to allow the annually scheduled running of a foot race as part of a local community event.

DATES: This rule is effective 8 a.m. to 11 a.m., September 25, 2005.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of this docket (CGD08–05–025) and are available for inspection or copying at room 2.107f in the Robert A. Young Federal Building, Eighth Coast Guard District, 1222 Spruce Street, Saint Louis, MO 63103, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Commander (obr), Eighth Coast Guard District, maintains the public docket for this rulemaking.

FOR FURTHER INFORMATION CONTACT: Mr. Roger K. Wiebusch, Bridge Administrator, (314) 539–3900, extension 2378.

SUPPLEMENTARY INFORMATION:

Regulatory History

On June 2, 2005, we published a notice of proposed rulemaking (NPRM) entitled Drawbridge Operation Regulation; Mississippi River, Iowa and Illinois in the **Federal Register** (70 FR 32276). We received no comment letters on the proposed rule. No public meeting was requested, and none was held.

Background and Purpose

On March 29, 2005, the Department of the Army, Rock Island Arsenal, requested a temporary change to the operation of the Rock Island Railroad & Highway Drawbridge, across the Upper Mississippi River, Mile 482.9, at Rock Island, Illinois to allow the drawbridge to remain in the closed-to-navigation position for a three hour period while a foot race is held in the city of Davenport, IA. The drawbridge has a vertical clearance of 23.8 feet above normal pool in the closed-to-navigation position. Navigation on the waterway consists primarily of commercial tows and recreational watercraft that will be minimally impacted by the limited closure period of three hours. Presently, the draw opens on signal for the passage of river traffic. The Rock Island Arsenal requested the drawbridge be permitted to remain closed-to-navigation from 8 a.m. until 11 a.m. on Sunday, September 25, 2005.

Discussion of Comments and Changes

The Coast Guard received no comment letters. No changes will be made to this temporary rule.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

The Coast Guard expects that this temporary change to operation of the Rock Island Railroad & Highway Drawbridge will have minimal economic impact on commercial traffic operating on the Upper Mississippi River. This temporary change has been written in such a manner as to allow for minimal interruption of the drawbridge's regular operation.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in

understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–800–REG–FAIR (1–800–734–3247).

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Government Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph 32(e) of the Instruction, from further environmental documentation.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

n For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

n 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; Department of Homeland Security Delegation No. 0170.1; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

n 2. From 8 a.m. to 11 a.m. on September 25, 2005, temporarily add new section 117.T394, to read as follows:

§ 117.T394 Upper Mississippi River.

The Rock Island Railroad and Highway Drawbridge, Mile 482.9, at Rock Island, Illinois, need not open for river traffic and may be maintained in the closed-to-navigation position.

Dated: August 5, 2005.

Kevin L. Marshall,

Captain, U.S. Coast Guard, Commander, 8th Coast Guard Dist. Acting.

[FR Doc. 05–16923 Filed 8–24–05; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TN–2000506; FRL–7952–2]

Approval and Promulgation of Air Quality Implementation Plans; Knox County, Tennessee; Revised Format for Materials Being Incorporated by Reference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; notice of administrative change.

SUMMARY: EPA is revising the format of part 52 of title 40 of the Code of Federal Regulations (40 CFR part 52) for materials submitted by Knox County that are incorporated by reference (IBR)

into the Tennessee State Implementation Plan (SIP). The regulations affected by this format change have all been previously submitted by the local agency and approved by EPA.

This format revision will affect the ''Identification of Plan'' sections of 40 CFR part 52, by adding a table for the Knox County portion of the Tennessee SIP. This revision will also affect the format of the SIP materials that will be available for public inspection at the Office of **Federal Register** (OFR), the Air and Radiation Docket and Information Center, and the Regional Office.

DATES: This action is effective August 25, 2005.

ADDRESSES: SIP materials which are incorporated by reference into 40 CFR part 52 are available for inspection at the following locations: Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, GA 30303; the EPA, Air and Radiation Docket and Information Center, Air Docket (Mail Code 6102T), 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Ms. Stacy DiFrank at the above Region 4 address or at (404) 562–9042.

SUPPLEMENTARY INFORMATION: Each state has a SIP containing the control measures and strategies used to attain and maintain the national ambient air quality standards (NAAQS). The SIP is extensive, containing such elements as air pollution control regulations, emission inventories, monitoring networks, attainment demonstrations, and enforcement mechanisms.

Each state must formally adopt the control measures and strategies in the SIP after the public has had an opportunity to comment on them and then submit the SIP to EPA. Once these control measures and strategies are approved by EPA, after notice and comment, they are incorporated into the federally approved SIP and are identified in 40 CFR part 52 ''Approval and Promulgation of Implementation Plans.'' The full text of the state regulation approved by EPA is not reproduced in its entirety in 40 CFR part 52, but is ''incorporated by reference.'' This means that EPA has approved a given state regulation with a specific effective date. The public is referred to the location of the full text version should they want to know which measures are contained in a given SIP. The information provided allows EPA and the public to monitor the extent to which a state implements a SIP to attain and maintain the NAAQS and to take enforcement action if necessary.

The SIP is a living document which the state can revise as necessary to address the unique air pollution problems in the state. Therefore, EPA from time to time must take action on SIP revisions containing new and/or revised regulations as being part of the SIP. On May 22, 1997, (62 FR 27968), EPA revised the procedures for incorporating by reference (IBR), into the Code of Federal Regulations, materials submitted by states in their EPA-approved SIP revisions. These changes revised the format for the identification of the SIP in 40 CFR part 52, streamlined the mechanisms for announcing EPA approval of revisions to a SIP, and streamlined the mechanisms for EPA's updating of the IBR information contained for each SIP in 40 CFR part 52. Pursuant to these revised procedures, EPA is revising the format for the identification of the Knox County portion of the Tennessee SIP, appearing in 40 CFR part 52. EPA has previously revised the format for the identification of the Tennessee SIP and the Memphis Shelby County portion of the SIP.

EPA has determined that today's action falls under the ''good cause'' exemption in section 553(b)(3)(B) of the Administrative Procedure Act (APA) which, upon finding ''good cause,'' authorizes agencies to dispense with public participation, and APA section 553(d)(3) which allows an agency to make an action effective immediately (thereby avoiding the 30-day delayed effective date otherwise provided for in the APA). Today's administrative action simply codifies provisions which are already in effect as a matter of law in Federal and approved state programs. Under section 553 of the APA, an agency may find good cause where procedures are ''impractical, unnecessary, or contrary to the public interest.'' Public comment for this administrative action is ''unnecessary'' and ''contrary to the public interest'' since the codification only reflects existing law. Immediate notice of this action in the **Federal Register** benefits the public by providing the public notice of the Knox County portion of the Tennessee SIP in Tennessee's ''Identification of Plan'' portion of the **Federal Register**.

Statutory and Executive Order Reviews

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this administrative action is not a ''significant regulatory action'' and is therefore not subject to review by the Office of Management and Budget. This action is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866. Because the agency has made a ''good cause'' finding that this action is not subject to notice-and-comment requirements under the APA or any other statute as indicated in the Supplementary Information section above, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). In addition, this action does not significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of UMRA. This administrative action also does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This administrative action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant. This administrative action does not involve technical standards; thus the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) do not apply. This administrative action also does not involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). This administrative action does not impose an information collection burden under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). EPA's compliance with these Statutes and Executive Orders for the underlying rules are discussed in previous actions

taken on Knox County, Tennessee's rules.

B. Submission to Congress and the Comptroller General

The Congressional Review Act (CRA) (5 U.S.C. 801 *et seq.*), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. Today's administrative action simply codifies provisions which are already in effect as a matter of law in Federal and approved state programs. 5 U.S.C. 808(2). These announced actions were effective when EPA approved them through previous rulemaking actions. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this action in the **Federal Register**. This revision to Knox County's portion of Tennessee's SIP in the ''Identification of Plan'' section of 40 CFR part 52 is not a ''major rule'' as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

EPA has also determined that the provisions of section 307(b)(1) of the Clean Air Act pertaining to petitions for judicial review are not applicable to this action. This action is simply an announcement of prior rulemakings that have previously undergone notice and comment rulemaking. Prior EPA rulemaking actions for each individual component of the Knox County portion of the Tennessee SIP previously afforded interested parties the opportunity to file a petition for judicial review in the United States Court of Appeals for the appropriate circuit within 60 days of such rulemaking action.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: August 4, 2005.

J.I. Palmer, Jr.,

Regional Administrator, Region 4.

n 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

n 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart RR—Knox County, Tennessee

n 2. Section 52.2220 is amended as follows:

n a. By revising paragraph (b); and

n b. Adding table 3 to paragraph (c) for Knox County, ''EPA Approved Knox County Regulations''.

§ 52.2220 Identification of plan.

* * * * *

(b) Incorporation by reference.

(1) Material listed in paragraph (c) of this section with an EPA approval date prior to December 1, 1998, for Tennessee (Table 1 of the Tennessee State Implementation Plan), January 1, 2003, for Memphis Shelby County (Table 2 of the Memphis Shelby County portion of the Tennessee State Implementation Plan), and March 1, 2005, for Knox County (Table 3 of the Knox County portion of the Tennessee State Implementation Plan) and paragraph (d) of this section with an EPA approval date prior to December 1, 1998 was approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Material is incorporated as it exists on the date of the approval, and notice of any change in the material will be published in the **Federal Register**. Entries in paragraph (c) of this section with EPA approval dates after December 1, 1998, for Tennessee (Table 1 of the Tennessee State Implementation Plan), January 1, 2003, for Memphis Shelby County (Table 2 of the Memphis Shelby County portion of the Tennessee State Implementation Plan) and March 1, 2005, for Knox County (Table 3 of the Knox County portion of the Tennessee State Implementation Plan) and paragraph (d) of this section with an EPA approval date after December 1, 1998 will be incorporated by reference in the next update to the SIP compilation.

(2) EPA Region 4 certifies that the rules/regulations provided by EPA in the SIP compilation at the addresses in paragraph (b)(3) of this section are an exact duplicate of the officially promulgated State rules/regulations which have been approved as part of the State implementation plan as of the dates referenced in paragraph (b)(1).

(3) Copies of the materials incorporated by reference may be inspected at the Region 4 EPA Office at 61 Forsyth Street, SW., Atlanta, GA 30303; the EPA, Air and Radiation Docket and Information Center, Air Docket (Mail Code 6102T), 1200 Pennsylvania Avenue, NW., Washington, DC 20460 and the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(c) * * *

TABLE 3.—EPA APPROVED KNOX COUNTY, REGULATIONS

State section	Title/subject	State effective date	EPA approval date	Explanation
12.0	Introduction	06/18/86	08/03/89, 54 FR 31953	
13.0	Definitions	12/13/90	02/21/90, 55 FR 5985	
14.0	Ambient Air Quality Standards	07/19/89	02/21/90, 55 FR 5985	
15.0	Prohibitions of Air Pollution	06/18/86	08/03/89, 54 FR 31953	
16.0	Open Burning	01/13/93	11/05/99, 64 FR 60348	
17.0	Regulation of Visible Emissions	10/13/93	11/01/94, 59 FR 54523	
18.0	Regulation of Non-Process Emissions	10/13/93	11/01/94, 59 FR 54523	
19.0	Regulation of Process Emissions	12/11/96	06/08/98, 63 FR 31121	
20.0	Regulation of Incinerators	06/18/86	08/03/89, 54 FR 31953	
22.0	Regulation of Fugitive Dust and Materials	06/18/86	08/03/89, 54 FR 31953	
23.0	Regulation of Hydrocarbon Emissions	06/16/72	10/28/72, 37 FR 23085	
24.0	Regulation of Airborne and Windborne Materials	06/18/86	08/03/89, 54 FR 31953	
25.0	Permits	06/10/98	11/05/99, 64 FR 60348	

TABLE 3.—EPA APPROVED KNOX COUNTY, REGULATIONS—Continued

State section	Title/subject	State effective date	EPA approval date	Explanation
26.0	Monitoring, Recording, and Reporting	06/10/92	04/28/93, 58 FR 25777	
27.0	Sampling and Testing Methods	06/10/92	04/28/93, 58 FR 25777	
28.0	Variances	06/10/92	04/28/93, 58 FR 25777	
29.0	Appeals	05/25/94	12/26/95, 60 FR 66748	
30.0	Violations	01/10/96	03/26/97, 62 FR 14327	
31.0	Right of Entry	06/18/86	08/03/89, 54 FR 31953	
32.0	Use of Evidence	06/18/86	08/03/89, 54 FR 31953	
33.0	Confidentiality and Accessibility of Records	06/18/86	08/03/89, 54 FR 31953	
34.0	Malfunction of Equipment	06/18/86	08/03/89, 54 FR 31953	
36.0	Emergency Regulations	07/19/89	02/21/90, 55 FR 5985	
37.0	Separation of Emissions	06/18/86	08/03/89, 54 FR 31953	
38.0	Combination of Emissions	06/18/86	08/03/89, 54 FR 31953	
39.0	Severability	06/18/86	08/03/89, 54 FR 31953	
41.0	Regulation for the Review of New Sources	06/18/86	08/03/89, 54 FR 31953	
45.0	Prevention of Significant Deterioration	06/10/92	04/28/93, 58 FR 25776	
46.0	Regulation of Volatile Organic Compounds	11/10/98	11/03/99, 64 FR 59628	
47.0	Good Engineering Practice Stack Height	10/13/93	11/01/94, 59 FR 54523	

* * * * *

[FR Doc. 05–16931 Filed 8–24–05; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register
Vol. 70, No. 164
Thursday, August 25, 2005

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 51

[Docket Number FV–04–310]

RIN# 0581–AC46

Revision of Fees for the Fresh Fruit and Vegetable Terminal Market Inspection Services

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule revises regulations governing the inspection and certification for fresh fruits, vegetables and other products by increasing by approximately 15 percent certain fees charged for the inspection of these products at destination markets. These revisions are necessary in order to recover, as nearly as practicable, the costs of performing inspection services at destination markets.

DATES: Comments must be postmarked, courier dated, or sent via the Internet on or before September 26, 2005.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments can be sent to: (1) U.S. Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Programs, Fresh Products Branch, 1400 Independence Ave., SW., Room 0640–S, Washington, DC 20250–0295; (2) faxed to (202) 720–5136; (3) via e-mail to *FPB.DocketClerk@usda.gov.;* or (4) Internet: *http://www.regulations.gov.* Comments should make reference to the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the above office during regular business hours.

FOR FURTHER INFORMATION CONTACT: Rita Bibbs-Booth, USDA, 1400 Independence Ave., SW., Room 0640–S, Washington, DC 20250–0295, or call (202) 720–0391.

SUPPLEMENTARY INFORMATION:

Executive Order 12866 and Regulatory Flexibility Act

This rule has been determined to be ''non-significant'' for the purposes of Executive Order 12866, and therefore, has not been reviewed by the Office of Management and Budget.

Also, pursuant to the requirement set forth in the Regulatory Flexibility Act (RFA), AMS has considered the economic impact of this action on small entities. Accordingly, AMS proposes this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. The proposed action described herein is being taken for several reasons, including that additional user fee revenues are needed to cover the costs or: (1) Providing current program operations and services: (2) improving the timeliness in which inspection services are provided; and (3) improving the work environment.

AMS regularly reviews its user-fee financed programs to determine if the fees are adequate. The Fresh Products Branch (FPB) has and will continue to seek out cost saving opportunities and implement appropriate changes to reduce its costs. Such actions can provide alternatives to fee increases. However, even with these efforts, FPB's existing fee schedule will not generate sufficient revenue to cover program costs while maintaining the Agency mandated reserve balance. Current revenue projections for FPB's destination market inspection work during FY 2005 are $14.6 million with costs projected at $20.9 million and an end-of-year reserve balance of $16.4 million. However, this reserve balance is due to appropriated funding received in October 2001, for infrastructure, workplace, and technological improvements. FPB's costs of operating the destination market program are expected to increase to approximately $22.4 million during FY–06 and $23.1 million during FY–07. The current fee structure with the infusion of the appropriated funding is expected to fund the terminal market inspection program until FY–2008, when FPB will fall below the Agency's mandated four-month reserve level.

This proposed fee increase should result in an estimated $1.8 million in additional revenues per year (effective in FY–2006, if the fees are implemented by October 1, 2005). This will not cover all of FPB's costs. FPB will need to continue to increase fees in order to cover the program's operating cost and maintain the required reserve balance. FPB believes that increasing fees incrementally is appropriate at this time. Additional fee increases beyond FY–2006 will be needed to sustain the program in the future.

Employee salaries and benefits are major program costs that account for approximately 80 percent of FPB's total operating budget. A general and locality salary increase for Federal employees, ranging from 3.71 to 4.87 percent depending on locality, effective January 2005, has significantly increased program costs. In addition, general and locality salary increases for Federal employees ranging from 3.90% to 4.92% depending on locality, effective from January 2004, also significantly increased program costs. This salary adjustment will increase FPB's costs by over $700,000 per year. Increases in health and life insurance premiums, along with workers compensation will also increase program costs. In addition, inflation also impacts FPB's non-salary costs. These factors have increased FPB's costs of operating this program by over $600,000 per year.

Additional funds of approximately $155,000 are necessary in order for FPB to continue to cover the costs associated with additional staff and to maintain office space and equipment. Additional revenues are also necessary to improve the work environment by providing training and purchasing needed equipment. In addition, FPB began in 2001, developing (with appropriated funds) the Fresh Electronic Inspection Reporting/Resource System (FEIRS) to replace its manual paper and pen inspection reporting process. FEIRS was implemented in 2004. This system has been put in place to enhance and streamline FPB's fruit and vegetable inspection process, however additional revenue is required to maintain FEIRS.

This proposed rule should increase user fee revenue generated under the destination market program by approximately 15 percent. This action is authorized under the Agricultural Marketing Act of 1946 (AMA of 1946)

(See 7 U.S.C. 1622(h)), which provides that the Secretary of Agriculture may assess and collect ''such fees as will be reasonable and as nearly as may be to cover the costs of services rendered * * *'' There are more than 2,000 users of FPB's destination market grading services (including applicants who must meet import requirements [1]—inspections which amount to under 2.5 percent of all lot inspections performed). A small portion of these users are small entities under the criteria established by the Small Business Administration (13 CFR 121.201). There would be no additional reporting, recordkeeping, or other compliance requirements imposed upon small entities as a result of this proposed rule. In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements in part 51 have been approved previously by OMB and assigned OMB No. 0581–0125. FPB has not identified any other Federal rules which may duplicate, overlap or conflict with this proposed rule.

The destination market grading services are voluntary (except when required for imported commodities) and the fees charged to users of these services vary with usage. However, the impact on all businesses, including small entities, is very similar. Further, even though fees will be raised, the increase is not excessive and should not significantly affect these entities. Finally, except for those persons who are required to obtain inspections, most of these businesses are typically under no obligation to use these inspection services, and, therefore, any decision on their part to discontinue the use of the services should not prevent them from marketing their products.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have retroactive effect. This rule will not preempt any state or local laws, regulations or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

Proposed Action

The AMA of 1946 authorizes official inspection, grading, and certification, on a user-fee basis, of fresh fruits, vegetables and other products such as raw nuts, Christmas trees and flowers. The AMA of 1946 provides that reasonable fees be collected from the users of the services to cover, as nearly as practicable, the cost of the services rendered. This proposed rule would amend the schedule for fees and charges for inspection services rendered to the fresh fruit and vegetable industry to reflect the costs necessary to operate the program.

The Agricultural Marketing Service (AMS) regularly reviews its user-fee programs to determine if the fees are adequate. While the Fresh Products Branch (FPB) of the Fruit and Vegetable Programs, AMS, continues to search for opportunities to reduce its costs, the existing fee schedule will not generate sufficient revenues to cover program costs while maintaining the Agency mandated reserve balance. Current revenue projections for destination market inspection work during FY–05 are $14.6 million with costs projected at $20.9 million and an end-of-year reserve of $17.9 million. However, this reserve balance is due to appropriated funding received from Congress in October of 2001. These funds were established to build up the terminal market inspection reserve fund and for infrastructure improvements including development and maintenance of the inspector training center, workplace and technological improvements, including digital imaging and automation of the inspection process. However, by FY–08, without increasing fees, FPB's trust fund balance for this program will be below the agency mandated four-months of operating reserve (approximately $4.6 million) deemed necessary to provide an adequate reserve balance in light of increasing program costs. Further, FPB's costs of operating the destination market program are expected to increase to approximately $22 million in FY–06 and to approximately $22.8 million during FY–07. These cost increases (which are outlined below) will result from inflationary increases with regard to current FPB operations and services (primarily salaries and benefit), increased inspection demands, and the acquisition and maintenance of computer technology (*i.e.* FEIRS).

Employee salaries and benefits are major program costs that account for approximately 80 percent of FPB's total operating budget. A general and locality salary increase for Federal employees, ranging from 3.71 to 4.87 percent depending on locality, effective January 2005, has significantly increased program costs. In addition, general and locality salary increases for Federal employees ranging from 3.90% to 4.92% depending on locality, effective from January 2004, also significantly increased program costs. This salary adjustment will increase FPB's costs by over $700,000 per year. Increases in health and life insurance premiums, along with workers compensation will also increase program costs. In addition, inflation also impacts FPB's non-costs. These factors have increased FPB's costs of operating this program by over $600,000 per year.

Additional revenues (approximately $155,000) are necessary in order for FPB to continue to cover the costs associated with additional staff and to maintain office space and equipment. Additional revenues are also necessary to continue to improve the work environment by providing training and purchasing needed equipment. In addition, FPB began in 2001, developing (with appropriate funds) an automated system known as FEIRS, to replace its manual paper and pen inspection reporting process. Approximately $10,000 in additional revenue per month will be needed to maintain the system. This system has been put in place to enhance FPB's fruit and vegetable inspection processes.

Based on the aforementioned analysis of this program's increasing costs, AMS proposes to increase the fees for destination market inspection services. The following table compares current fees and charges with the proposed fees and charges for fresh fruit and vegetable inspection as found in 7 CFR 51.38. Unless otherwise provided for by regulation or written agreement between the applicant and the Administrator, the charge in the schedule of fees as found in § 51.38 are:

[1] Section 8e of the Agriculture Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), requires that whatever the Secretary of Agriculture issues grade, size, quality or maturity regulations under domestic marketing orders for certain commodities, the same or comparable regulations on imports of those commodities must be issued. Import regulations apply during those periods when domestic marketing order commodities must be issued. Import regulations apply during those periods when domestic marketing order regulations are in effect. Section 1308 of the Farm Security and Rural Investment Act of 2002 (Pub. L. 107–171), 7 U.S.C. 7958, requires USDA among other things to develop new peanut quality and handling standards for imported peanuts marketing in the United States. Currently, there are 14 commodities subject to 8e import regulations: avocados, dates (other than dates for processing), filberts, grapefruits, kiwifruit, olives (other than Spanish-style green olives), onions, oranges, potatoes, prunes, raisins, table grapes, tomatoes and walnuts. A current listing of the regulated commodities can be found under 7 CFR parts 944, 980, 996, and 999.

Service	Current	Proposed
Quality and condition inspections of products each in quantities of 51 or more packages and unloaded from the same land or air conveyance:		
—Over a half carlot equivalent of each product	$99.00	$114.00
—Half carlot equivalent or less of each product	83.00	95.00
—For each additional lot of the same product	45.00	52.00
Condition only inspections of products each in quantities of 51 or more packages and unloaded from the same land or air conveyance:		
—Over a half carlot equivalent of each product	83.00	95.00
—Half carlot equivalent or less of each product	76.00	87.00
—For each additional lot of the same product	45.00	52.00
Quality and condition and condition only inspections of products each in quantities of 50 or less packages unloaded from the same land or air conveyance:		
—For each product	45.00	52.00
—For each additional lot of any of the same product	45.00	52.00
—Lots in excess of carlot equivalents will be charged proportionally by the quarter carlot	.....	.....
Dock side inspections of an individual product unloaded directly from the same ship:		
—For each package weighing less than 30 pounds	[1] 2.5	[1] 2.9
—For each package weighing 30 or more pounds	[1] 3.8	[1] 4.4
—Minimum charge per individual product	99.00	114.00
—Minimum charge for each additional lot of the same product	45.00	52.00
Hourly rate for inspections performed for other purposes during the grader's regularly scheduled work week	49.00	56.00
—Hourly rate for other work performed during the grader's regular scheduled work week will be charged at a reasonable rate	.....	.....
Audit based services	.....	75.00
Overtime or holiday premium rate (per hour additional) for all inspections performed outside the grader's regularly scheduled work week	25.00	29.00
Hourly rate for inspections performed under 40 hour contracts during the grader's regularly scheduled work week	49.00	56.00
Rate for billable mileage	1.00	1.00

[1] Cents.

A thirty day comment period is provided for interested persons to comment on this proposed action. Thirty days is deemed appropriate because it is preferable to have any fee increase, if adopted, to be in place as close as possible to the beginning of the fiscal year, October 1, 2005.

List of Subjects in 7 CFR Part 51

Agricultural commodities, Food grades and standards, Fruits, Nuts, Reporting and record keeping requirements, Trees, Vegetables.

For reasons set forth in the preamble, 7 CFR part 51 is proposed to be amended as follows:

PART 51—[AMENDED]

1. The authority citation for 7 CFR part 51 continues to read as follows:

Authority: 7 U.S.C. 1621–1627.

2. Section 51.38 is revised to read as follows:

§ 51.38 Basis for fees and rates.

(a) When performing inspections of product unloaded directly from land or air transportation, the charges shall be determined on the following basis:

(1) Quality and condition inspections of products in quantities of 51 or more packages and unloaded from the same air or land conveyance:

(i) $114 for over a half carlot equivalent of an individual product;

(ii) $95 for a half carlot equivalent or less of an individual product;

(iii) $52 for each additional lot of the same product.

(2) Condition only inspection of products each in quantities of 51 or more packages and unloaded from the same land or air conveyance:

(i) $95 for over a half carlot equivalent of an individual product;

(ii) $87 for a half carlot equivalent or less of an individual product;

(iii) $52 for each additional lot of the same product.

(3) For quality and condition inspection and condition only inspection of products in quantities of 50 or less packages unloaded from the same conveyance:

(i) $52 for each individual product;

(ii) $52 for each additional lot of any of the same product. Lots in excess of carlot equivalents will be charged proportionally by the quarter carlot.

(b) When performing inspections of palletized products unloaded directly from sea transportation or when palletized product is first offered for inspection before being transported from the dock-side facility, charges shall be determined on the following basis:

(1) Dock side inspections of an individual product unloaded directly from the same ship:

(i) 2.9 cents per package weighing less than 30 pounds;

(ii) 4.4 cents per package weighing 30 or more pounds;

(iii) Minimum charge of $114 per individual product;

(iv) Minimum charge of $52 for each additional lot of the same product.

(2) [Reserved].

(c) When performing inspections of products from sea containers unloaded directly from sea transportation or when palletized products unloaded directly from sea transportation are not offered for inspection at dock-side, the carlot fees in paragraph (a) of this section shall apply.

(d) When performing inspections for Government agencies, or for purposes other than those prescribed in paragraphs (a) through (c) of this section, including weight-only and freezing-only inspections, fees for inspections shall be based on the time consumed by the grader in connection with such inspections, computed at a rate of $56 per hour: *Provided,* That:

(1) Charges for time shall be rounded to the nearest half hour.

(2) The minimum fee shall be two hours for weight-only inspections, and one-half hour for other inspections.

(3) When weight certification is provided in addition to quality and/or condition inspection, a one hour charge shall be added to the carlot fee.

(4) When inspections are performed to certify product compliance for Defense Personnel Support Centers, the daily or weekly charge shall be determined by multiplying the total hours consumed to

conduct inspections by the hourly rate. The daily or weekly charge shall be prorated among applicants by multiplying the daily or weekly charge by the percentage of product passed and/or failed for each applicant during that day or week. Waiting time and overtime charges shall be charged directly to the applicant responsible for their incurrence.

(e) When performing inspections at the request of the applicant during periods which are outside the grader's regularly scheduled work week, a charge for overtime or holiday work shall be made at the rate of $29.00 per hour or portion thereof in addition to the carlot equivalent fee, package charge, or hourly charge specified in this subpart. Overtime or holiday charges for time shall be rounded to the nearest half hour.

(f) When an inspection is delayed because product is not available or readily accessible, a charge for waiting time shall be made at the prevailing hourly rate in addition to the carlot equivalent fee, package charge, or hourly charge specified in this subpart. Waiting time shall be rounded to the nearest half hour.

Dated: August 18, 2005.

Kenneth C. Clayton,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 05–16863 Filed 8–24–05; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 983

[Docket No. FV05–983–2 PR]

Pistachios Grown in California; Establishment of Additional Inspection Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule invites comments on the establishment of additional inspection requirements authorized under the California pistachio marketing order (order). The order regulates the handling of pistachios grown in California and is administered locally by the Administrative Committee for Pistachios (Committee). This rule would modify sampling procedures for dark-stained pistachios which are intended to be dyed or color-coated. It would also establish reinspection requirements for lots of pistachios, which are materially changed after meeting initial aflatoxin, quality, and size requirements. This action is expected to assure the quality of pistachios, improve the marketability of pistachios, and provide handlers more marketing flexibility. The benefits of this action are expected to offset the increased inspection costs.

DATES: Comments must be received by September 1, 2005.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938, or E-mail: *moab.docketclerk@usda.gov,* or Internet: *http://www.regulations.gov.* All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html.*

FOR FURTHER INFORMATION CONTACT: Rose Aguayo or Terry Vawter, Marketing Specialists, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This proposal is issued under Marketing Order No. 983 (7 CFR part 983), regulating the handling of pistachios grown in California, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This proposal will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule would modify sampling procedures for dark-stained pistachios which are intended to be dyed or color-coated. It would also establish reinspection requirements for lots of pistachios, which are materially changed after meeting initial aflatoxin, quality, and size requirements. This action is expected to assure the quality of pistachios, provide handlers more marketing flexibility, and improve the marketability of pistachios. The benefits of this action are expected to offset the increased inspection costs. For the purposes of this proposed rule, the terms ''marketing year'' and ''production year'' are synonymous.

Section 983.46 of the order authorizes the Committee to recommend that the Secretary modify or suspend the order provisions contained in §§ 983.38 through 983.45. These sections took effect August 1, 2005.

Sampling Procedures

Sections 983.38 and 983.39 of the order specify maximum aflatoxin, minimum quality and minimum size requirements, respectively, that must be met prior to the shipment of pistachios.

Sections 983.38(d)(1) and 983.39(e)(1) of the order specify that a sample must be drawn from each lot, and that this lot sample must be divided into two samples—one portion for aflatoxin testing and one for minimum quality and size testing.

Section 983.39(b)(3)(iv) of the order currently defines dark stain and specifies that pistachios that are dyed or color-coated to improve their marketing

quality are not subject to the maximum permissible defects for dark stain.

Pistachios grow on trees in grape-like clusters and are encased in an outer skin, or hull. During the pistachio harvest process, the nuts, which contain a significant amount of moisture when harvested, must arrive at the handling facility as soon as possible and the hulls covering the shell must be removed. If the hulls are not removed from the nuts within 24 hours of their removal from the tree, staining of the outer shell occurs. After being hulled, the pistachios are then dried, and placed in storage containers. When the nuts are removed from storage, they are sorted, sized, graded, and mechanically separated into open and closed shell product (pin-picked), and placed into lots for aflatoxin and minimum quality testing. Some handlers have the pistachios tested for aflatoxin prior to these processes. A ''lot'' is any quantity of pistachios that is designated for testing.

During the sorting process, the inshell pistachios are separated by the color of the shells and the amount of stain on the shells. On average, approximately 95 percent of the harvested inshell pistachios are placed into lots designated as non-stained or light-stained pistachios. Such pistachios are typically marketed without any treatment to cover the stains. The remaining 5 percent are placed into lots consisting primarily of dark-stained inshell pistachios. Handlers typically dye or color-coat the dark-stained inshell pistachios to cover the stains, because they are generally not marketable in their natural state. The staining detracts from their appearance.

The color-coating process usually consists of applying a white coating or a flavoring to the shells of the pistachios. The dyeing process consists of applying a dye to the shells. These pistachios are marketed after either of these processes are performed by the handler.

Under the regulatory requirements of the order, one test sample will be drawn per lot and divided into two portions—one for aflatoxin testing and the other for minimum quality and size testing. Handlers or the inspection service will draw this sample while the pistachios are in their natural state (prior to dyeing or color-coating) because false positive test results may occur when dyed or color-coated pistachios are used in conducting aflatoxin tests. Lots of badly stained natural condition pistachios would likely exceed the maximum permissible 3 percent by weight tolerance for dark stain. Thus, they would fail to meet existing voluntary minimum quality requirements under the U.S. Grade Standards for Pistachios in the Shell (7 CFR 51.2540 through 51.2549) or the minimum quality requirements under the order, that became effective August 1, 2005.

On dark stained lots, it is common practice for handlers to use or submit the portion of the initial natural sample designated for aflatoxin testing for the aflatoxin testing at a USDA or USDA approved laboratory. If the sample meets the aflatoxin requirements, handlers then return the sample portion designated for the minimum quality and minimum size testing to the lot, dye or color-coat the lot, and draw or have drawn a second representative dyed or color-coated sample for minimum quality and size testing. The second representative sample is taken after the pistachios have been dyed or color-coated to assure that the coloring is uniform and adequately covers the stained pistachios.

Because the inspection requirements do not provide for a second sample after dyeing or color-coating, the Committee, on December 15, 2004, recommended modifying the order's sampling procedures and establishing a new section entitled ''§ 983.138—Samples for testing.'' The vote was 8 in favor and 0 opposed.

For those lots that consist of primarily light-stained or non-stained inshell pistachios, one sample would continue to be drawn as specified in §§ 983.38(d)(1) and 983.39(e)(1) of the order.

The Committee estimated that the total 2005–06 inshell pistachio crop will be approximately 200 million pounds and that approximately 5 percent (6 million pounds or 600 lots) of all inshell pistachios marketed domestically would be dyed or color-coated to cover dark-stained shells.

While this modification to sampling procedures under the order is expected to result in a slight increase in inspection costs for lots which are dyed or color-coated, the improvement in the marketability of these pistachios is expected to offset the additional costs. When the dark-stained pistachios are shelled out, the kernels generally have an approximate value of $1.00 per pound, which is substantially less than the $2.00 per pound value of dyed or color-coated inshell pistachios.

Producers, handlers, and consumers benefit from dyeing or color-coating, because dyeing or color-coating dark-stained inshell pistachios results in nuts having a more desirable color. This makes the nuts more appealing to retailers and consumers. Thus, retailers are willing to pay on average $2.00 per pound for these previously unmarketable dark-stained inshell pistachios. This increased value also is expected to contribute to improved or maintained producer returns.

Reinspection

Sections 983.38 and 983.39 of the order will specify maximum aflatoxin, and minimum quality and minimum size requirements, respectively. These sections took effect August 1, 2005.

Section 983.39(e) of the pistachio order will provide minimum quality testing and inspection procedures and require each lot of pistachios to be certified, be uniquely identified, and traceable from testing through shipment by the handler.

Section 983.41 of the pistachio order provides handlers who handle less than 1 million pounds of assessed weight (dried weight) pistachios per production year (September 1–August 31) with certain aflatoxin testing options and allows such handlers to apply to the Committee for an exemption from minimum quality testing. Handlers granted an exemption will be required to pull the samples, make them available for review by the Committee, and maintain these samples in their handling facilities for 90 days. Handlers who do not apply or who are not granted an exemption from minimum quality testing, must test all lots for aflatoxin, quality, and size requirements under the order. This section also took effect August 1, 2005.

Section 983.42 of the pistachio order provides that handlers may commingle aflatoxin and minimum quality certified lots with other certified lots. This section took effect August 1, 2005.

Section 983.43 of the pistachio order provides authority for the Committee to recommend the establishment of rules and regulations to specify conditions under which pistachios would be subject to reinspection. This section, too, took effect August 1, 2005.

Section 983.70 of the pistachio order exempts handlers who handle 1,000 pounds or less of dried weight pistachios during any marketing year (dried to 5 percent moisture) within the production area from all aflatoxin and minimum quality requirements.

As mentioned earlier, during the production year handlers typically hull and dry pistachios and place the nuts into storage containers. These nuts usually remain in storage until an order is received from a buyer. When the nuts are removed from storage, handlers have the option of sampling and having the nuts tested for aflatoxin prior to further processing (*i.e.*, sorting, sizing, grading, and pin-picking (segregating the split-

and closed-shell pistachios)), or placing the nuts into lots for aflatoxin and minimum quality and size testing after these processes have been performed. The first option is expected to be used primarily by those handlers who have been granted an exemption from minimum quality and size testing pursuant to § 983.41(b). Most handlers are expected to perform these processes, segregate the pistachios into lots, and then draw or have drawn the samples for the required aflatoxin, quality, and size tests.

Typically, handlers who handle a million or more pounds of assessed weight pistachios per marketing year further process the nuts prior to testing for aflatoxin, quality, and size requirements. Such handlers, pursuant to § 983.38(d) are required to uniquely identify each lot so that it can be traced from the point of testing through shipment.

Pistachio handlers who handle less than a million pounds of assessed weight pistachios per marketing year and whose pistachios pass aflatoxin testing requirements would not have to comply with the traceability procedures set forth in § 983.38(d). Furthermore, pursuant to § 983.41(a) of the order, such handlers may test their entire inventory (maximum lot size of 150,000 pounds) or segregate receipts into various sized lots and have an inspector sample and test each specified lot for aflatoxin and may also, pursuant to § 983.41(b) of the order, apply to the Committee for an exemption from minimum quality testing.

Because it is more economical for smaller handlers to test larger lots for aflatoxin and to be exempt from minimum quality testing, it is expected that the majority, if not all such handlers, will apply for the exemption from minimum quality testing.

Exempted handlers, who handle more than 1,000 pounds and less than a million pounds of assessed weight pistachios per marketing year, would draw or have one sample drawn per lot. This sample would be divided into two portions, one for aflatoxin and one for minimum quality testing. Typically, when such handlers receive notice that the lots have passed aflatoxin testing requirements, they return the sample portion designated for minimum quality testing to the lot. Such lots are then further processed (*i.e.*, sized, sorted, air-legged, pin-picked, and graded). Handlers would then draw a new sample, which is required to be maintained for 90 days at the handler's facilities and required to be made available for review or auditing by the Committee. Those handlers who handle more than 1,000 pounds and less than a million pounds and who are not granted such an exemption by the Committee are required to meet the traceability procedures as specified in § 983.38(d) of the order and the aflatoxin, quality, and size requirements under the order.

After certification for aflatoxin, quality, and size or pulling and retaining required samples, the majority of these lots are shipped directly into the channels of commerce. However, some certified lots are readied and retained in the handler's facility in anticipation of future orders.

When handlers receive new orders, they typically either resort or resize existing certified lots of inshell pistachios or create new lots from uncertified stored nuts. When existing certified lots are used they generally have to be reworked to meet specific buyer needs. For instance, light-stained nuts, dark-stained nuts, insect infested nuts, smaller or larger-sized nuts, closed shell or open shell nuts may have to be removed via hand-sorting, color-sorting, pin-picking and/or resizing. Removal of these nuts results in new lots which no longer have representative inspection certificates. Such lots would be considered to have been ''materially changed''.

Thus, the Committee at its November 3, 2004, meeting, unanimously recommended establishing a new section entitled ''§ 983.143—Reinspection'' to define the term ''materially changed'' and to specify handler reinspection requirements to assure the quality of pistachios entering market channels.

The Committee, at its April 12, 2005, meeting, reconsidered and further clarified its previous recommendation. The Committee unanimously recommended that, effective August 1, 2005, lots which are color-sorted, hand-sorted, pin-picked, and/or resized after being initially certified for aflatoxin, quality, and size requirements under the order be considered ''materially changed'' and that any portion of a lot (the portion resorted and resized to meet buyer specifications or the portion that was removed from the original lot) be inspected as new lots. The Committee clarified, that § 983.42 which provides that previously certified lots can be commingled with other certified lots, does not apply to portions of lots which are materially changed under the order, as such newly formed lots may no longer contain the same quantity or quality of inshell pistachios as the original lots.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses would not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 24 handlers of California pistachios subject to regulation under the order and approximately 741 producers in the production area. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $6,000,000. Seventeen of the 24 handlers subject to regulation have annual pistachio receipts of less than $6,000,000. In addition, 722 producers have annual receipts less than $750,000. Thus, the majority of handlers and producers of California pistachios may be classified as small entities.

This rule would modify sampling procedures for dark-stained pistachios which are intended to be dyed or color-coated. It would also establish reinspection requirements for lots of pistachios, which are materially changed after meeting initial aflatoxin, quality, and size requirements. This action is expected to assure the quality of pistachios, provide handlers more marketing flexibility, improve the marketability of pistachios, and enhance the marketability of reworked pistachios. These benefits are expected to offset increased inspection costs.

Section 983.46 of the order authorizes the Committee to recommend that the Secretary modify or suspend order provisions contained in §§ 983.38 through 983.45. These provisions took effect August 1, 2005.

Sampling Procedures

Sections 983.38 and 983.39 of the order specify maximum aflatoxin, minimum quality and minimum size requirements, respectively, that must be met prior to the shipment of pistachios.

Sections 983.38(d)(1) and 983.39(e)(1) of the order specify that a sample must

be drawn from each lot, and that this lot sample must be divided into two samples—one portion for aflatoxin testing and one for minimum quality and size testing.

Section 983.39(b)(3)(iv) of the order defines dark stain and specifies that pistachios that are dyed or color-coated to improve their marketing quality are not subject to the maximum permissible defects for dark stain.

Pistachios grow on trees in grape-like clusters and are encased in an outer skin, or hull. During the pistachio harvest process, the nuts, which contain a significant amount of moisture when harvested, must arrive at the handling facility as soon as possible and the hulls covering the shell must be removed. If the hulls are not removed from the nuts within 24 hours of their removal from the tree, staining of the outer shell occurs. After being hulled, the pistachios are then dried, and placed in storage containers. When the nuts are removed from storage, they are sorted, sized, graded, and mechanically separated into open and closed shell product (pin-picked) and placed into lots for aflatoxin and minimum quality testing. A ''lot'' is any quantity of pistachios that is segregated for testing.

During the sorting process, the inshell pistachios are separated by the color of the shells and the amount of stain on the shells. On average, approximately 95 percent of the harvested inshell pistachios are placed into lots designated as non-stained or light-stained pistachios. Such pistachios are typically marketed without any treatment to cover or remove the stains. The remaining 5 percent are placed into lots consisting primarily of dark-stained inshell pistachios. Handlers typically dye or color-coat the dark-stained inshell pistachios to cover the stains, because they are generally not marketable in their natural state.

The color-coating process usually consists of applying a white coating or a flavoring to the shells of the pistachios. The dyeing process consists of applying a dye to the shells.

Prior to placing pistachios into the domestic channels of commerce on August 1, 2005, and later, handlers will be required to draw or have drawn a sample and test or have tested each sample for aflatoxin, quality, and size requirements, unless exempted under §§ 983.41 or 983.70 of the order.

Under the regulatory requirements of the order, one test sample will be drawn per lot and divided into two portions—one for aflatoxin testing and the other for minimum quality and size testing. Handlers will draw this sample while the pistachios are in their natural state (prior to dyeing or color-coating) because false positive test results may occur when dyed or color-coated pistachios are used in conducting aflatoxin tests.

When handlers believe that lots of natural condition pistachios exceed the maximum permissible 3 percent by weight tolerance for dark stain under the existing voluntary minimum quality requirements of the U.S. Grade Standards for Pistachios in the Shell (7 CFR part 51.2540 through 51.2549), or the minimum quality requirements under the order, they will have the natural condition portion of the sample designated for aflatoxin testing tested. If the sample meets the aflatoxin requirements, handlers then return the sample portion designated for the minimum quality and minimum size testing to the lot, dye or color-coat the lot, and draw or have drawn a second representative dyed or color-coated sample to be tested for minimum quality and size. This second sample is taken after the pistachios have been dyed or color-coated to assure that the color is uniform and adequately covers the staining.

Because the inspection requirements do not provide for sampling and inspections at this stage of the process, the Committee, on December 15, 2004, recommended modifying the order's sampling procedures and establishing a new section entitled ''§ 983.138 Samples for testing.'' The vote was 8 in favor and 0 opposed.

The first alternative considered was to leave the order provisions unchanged, but this alternative was not adopted, as handlers, producers, and consumers would benefit from permitting the orderly marketing of pistachios containing edible nutmeats that fail minimum quality for external cosmetic reasons. The Committee also considered providing handlers with more flexibility in removing dark-stained inshell pistachios from lots, but decided that modifying the sampling procedures for lots intended for dyeing or color-coating would allow handlers to market these dark-stained pistachios without having to implement lengthy and costly removal processes.

The Committee estimated that the total 2005–06 inshell pistachio crop will be approximately 200 million pounds and that approximately 5 percent (6 million pounds or 600 lots) of all inshell pistachios marketed domestically would be dyed or color-coated to cover dark-stained shells.

While this modification to sampling procedures under the order is expected to result in a slight increase in inspection costs for lots which are dyed or color-coated, the improvement in the marketability of these pistachios is expected to offset the additional costs. When the dark-stained pistachios are shelled out, the kernels are expected to have an approximate value of $1.00 per pound, which is substantially less than the $2.00 per pound value of dyed or color-coated inshell pistachios.

Accordingly, producers, handlers, and consumers would benefit, as dyeing and color-coating dark-stained inshell pistachios results in nuts with a more pleasing appearance. Covering the dark stain would allow these edible pistachios to meet minimum quality requirements under the order and also make the pistachios more appealing to retailers and consumers. Retailers are expected to be willing to pay on average $2.00 per pound for these nuts that were previously unmarketable as inshell nuts. This increased value also is expected to contribute to improved or maintained producer returns.

Reinspection

Sections 983.38 and 983.39 of the order specify maximum aflatoxin requirements, and minimum quality and minimum size requirements, respectively.

Section 983.39(e) of the pistachio order provides minimum quality testing and inspection procedures and requires that each lot of pistachios to be certified be uniquely identified and traceable from testing through shipment by the handler.

Section 983.43 of the pistachio order provides authority for the Committee to recommend the establishment of rules and regulations to specify conditions under which pistachios would be subject to reinspection.

Section 983.41 of the pistachio order provides handlers who handle less than 1 million pounds of assessed weight (dried weight) pistachios per production year (September 1–August 31) with certain aflatoxin testing options and allows such handlers to apply to the Committee for an exemption from minimum quality testing. Handlers granted an exemption must pull the samples and maintain these samples in their handling facilities for 90-days for review and audit by the Committee when requested. Handlers who are not granted an exemption from minimum quality testing, must test all lots for aflatoxin, quality and size requirements under the order.

Section 983.42 of the pistachio order provides that handlers may commingle aflatoxin and minimum quality certified lots with other certified lots. This section took effect August 1, 2005.

Section 983.43 of the pistachio order provides authority for the Committee to recommend the establishment of rules and regulations to specify conditions under which pistachios would be subject to reinspection. This section, too, took effect August 1, 2005.

Section 983.70 of the pistachio order exempts handlers who handle 1,000 pounds or less of dried weight pistachios during any marketing year (dried to 5 percent moisture) within the production area from all aflatoxin and minimum quality requirements.

As mentioned earlier, during the production year handlers typically hull and dry pistachios and place the nuts into storage containers. These nuts usually remain in storage until an order is received from a buyer. When the nuts are removed from storage, handlers have the option of testing the nuts for aflatoxin prior to further processing (*i.e.*, sorting, sizing, grading, pin-picking (segregating the split- and closed-shell nuts), or placing the nuts into lots for aflatoxin and minimum quality and size testing after these processes have been completed.

Typically, handlers who handle a million or more pounds of assessed weight pistachios per marketing year further process the nuts prior to testing for aflatoxin, quality, and size requirements. Such handlers, pursuant to § 983.38(d) are required to uniquely identify each lot so that it can be traced from the point of testing through shipment.

Pistachio handlers who handle less than a million pounds of assessed weight pistachios per marketing year and whose pistachios pass aflatoxin testing requirements would not have to comply with the traceability procedures set forth in § 983.38(d). Furthermore, pursuant to § 983.41(a) of the order, such handlers may test their entire inventory (maximum lot size of 150,000 pounds) or segregate receipts into various sized lots and have an inspector sample and have each specified lot tested for aflatoxin and may also, pursuant to § 983.41(b) of the order, apply to the Committee for exemption from minimum quality testing.

Because it is more economical for smaller handlers to test larger lots for aflatoxin and to be exempt from minimum quality testing, it is expected that the majority, if not all such handlers, will apply for the exemption from minimum quality and size testing.

Thus, those exempted handlers, who handle more than 1,000 pounds and less than a million pounds of assessed weight pistachios per marketing year, would draw or have one sample drawn per lot. This sample would be divided into two portions, one for aflatoxin and one for minimum quality testing. Typically, when such handlers receive notice that the lots have passed aflatoxin testing requirements, they return the sample portion designated for minimum quality testing to the lot. Such lots are then further processed (sized, sorted, air-legged, pin-picked, and graded). Handlers would then draw a new sample, which is required to be maintained for 90-days at the handler's facilities and made available for review or auditing by the Committee.

Those handlers who handle more than 1,000 pounds and less than a million pounds and who are not granted such an exemption by the Committee are required to meet the traceability procedures as specified in § 983.38(d) of the order and the aflatoxin, quality, and size requirements under the order for each lot of pistachios.

After certification for aflatoxin, quality, and size or pulling and retaining required samples, the majority of these lots are shipped directly into the channels of commerce. However, some certified lots are readied and retained in the handler's facility in anticipation of future orders.

When handlers receive new orders, they typically either resort or resize existing certified lots of inshell pistachios or create new lots from uncertified stored nuts. When existing certified lots are used they generally have to be reworked to meet specific buyer needs. For instance, light-stained nuts, dark-stained nuts, insect infested nuts, smaller or larger sized nuts, closed shell or open shell nuts may have to be removed via hand-sorting, color-sorting, pin-picking and/or resizing. Removal of these nuts, results in new lots which no longer have representative inspection certificates. Such lots would be considered to have been ''materially changed''.

Thus, the Committee at its November 3, 2004, meeting, unanimously recommended establishing a new section entitled ''§ 983.143—Reinspection'' to define the term ''materially changed'' and to specify handler reinspection requirements.

The Committee, at its April 12, 2005, meeting, reconsidered and further clarified its previous recommendation. The Committee unanimously recommended that, effective August 1, 2005, lots which are color-sorted, hand-sorted, pin-picked, and/or resized after being initially certified for aflatoxin, quality, and size requirements under the order be considered ''materially changed'' and that any portion of a lot (the portion resorted and resized to meet buyer specifications or the portion that was removed from the original lot) be inspected as new lots. The Committee clarified, that § 983.42 which provides that previously certified lots can be commingled with other certified lots, does not apply to portions of lots which are materially changed under the order, as such newly formed lots may no longer contain the same quantity or quality of inshell pistachios as the original lots.

Lastly, the Committee recommended that some handlers be exempt from reinspection requirements under the order. As previously mentioned, § 983.70 of the pistachio order exempts handlers who handle 1,000 pounds or less of dried weight pistachios during any marketing year (dried to 5 percent moisture) from all aflatoxin and minimum quality requirements. Thus, the Committee recommended that such handlers also be exempt from any reinspection requirements under the order.

Additionally, § 983.41 of the pistachio order provides that handlers who handle less than 1 million pounds of assessed weight (dried weight) pistachios per production year (September–August 31) with certain aflatoxin testing options and allows such handlers to apply to the Committee for an exemption from minimum quality and size testing. The order further provides that handlers, who are granted an exemption, shall pull and maintain for 90 days representative lot samples of any lots intended to be shipped into the domestic channels of commerce for review and audit by the Committee as requested.

The Committee recommended exempting such handlers from reinspection requirements, as typically such handlers pull or have pulled representative lot samples immediately prior to shipment, do not materially change the lots, and ship such lots directly into the domestic channels of commerce and because the Committee believed such smaller handlers could be negatively impacted by the additional cost of reinspection. However, because such handlers could materially change their lots prior to shipment into the domestic channels of commerce, USDA is proposing to require such handlers to pull or have pulled representative samples of the materially changed lots to assure the quality of the pistachios and to keep the sampling and inspection procedures consistent with order authority. As noted in this document, the costs for reinspection are expected to be small compared to the benefit of assuring the quality of the pistachios entering commercial channels.

Such representative lot samples would be divided into two parts, one part would be retested for aflatoxin and the other part would be maintained for 90 days at the handler's facilities. Such samples would be stored in the handler's facility and should not add to the handler's cost. Additionally, handlers would be required to make those samples maintained for 90 days available for auditing by the Committee.

While handlers who handle less than a million pounds may apply to the Committee for a minimum quality testing exemption, there may be occasions when the Committee does not grant these handlers such an exemption. The Committee unanimously recommended that such handlers and any handler who handles more than a million pounds of assessed weight pistachios during per marketing year and who materially changes any lot of pistachios shall test or have tested such lots for aflatoxin, and minimum quality and size requirements under the order before shipping such pistachios into the domestic channels of commerce, when the order requirements took effect on August 1, 2005.

The Committee also discussed alternatives to this change, including not establishing these reinspection requirements, but believes that consumers should be provided with assurance of a certified high quality product that does not currently exist when a certified lot is ''materially changed.'' Also, the Committee discussed but decided not to include the following processes in the definition of ''materially changed'': (1) Roasting, salting, flavoring, dyeing, color-coating, were discussed but not included in the definition as these processes do not alter a lot's minimum quality or maximum aflatoxin levels; (2) cleaning was considered but not included because cleaning typically is accomplished prior to the initial inspection; and (3) air-legging which is performed to remove loose shells, was considered but not included because this process does not significantly change a lot.

Lastly, the Committee discussed whether tracing a lot would provide assurance that materially changed lots would continue to meet the order's maximum aflatoxin and minimum quality requirements and believed that it would not provide such assurance. It is of the view, that the best way to assure the quality of materially changed lots was through resampling and retesting.

The Committee also discussed the slight increase in the cost of inspection and the benefits of this action for handlers, consumers, and producers. Typically, nuts removed from materially changed lots are blended into other lots of uninspected inshell pistachios, shelled out into kernels, dyed or color-coated, or discarded. Very few inshell pistachios are discarded, as handlers typically further process the nuts to obtain as many marketable nuts as possible.

Closed-shell pistachios that are not blended into other uninspected lots are typically shelled out into kernels. Kernels are marketed on average for $1.00 per pound on the domestic market and can be marketed in some export markets for $2.00 to $3.00 per pound. Ordinarily, the dark-stained pistachios that are not blended into other uninspected lots are dyed or color-coated and are marketed for $2.00 per pound in the domestic market, slightly less than the price received for natural condition, inshell pistachios. Dyed or color-coated nuts occasionally can be marketed in export markets as well. The Committee mentioned that the cost of resorting and resizing lots varies from lot to lot, and that such costs are dependent upon whether the product is hand sorted or mechanically sorted, the size of the lot, the percentage of the lot removed, and other similar factors. The Committee believes that the overall handler cost for resorting and/or resizing such lots is typically insignificant compared to the prices received for better quality lots.

In reviewing inspection costs, the Committee believes that a typical initial aflatoxin certification costs approximately $70 per lot and an initial minimum quality inspection costs $100 per lot. Buyers and consumers are willing to pay more for more appealing pistachios. Therefore, the Committee expects that handlers will market these materially changed lots at prices that will offset the combined costs of initial inspection, reprocessing, and reinspection.

Thus, this action is expected to benefit handlers, buyers, and consumers. Handlers and buyers would be able to offer higher quality lots and consumers would receive more appealing, higher quality pistachios. These higher quality lots also should contribute to improved grower returns.

The Committee does not foresee any industry problems that may result from implementation of this recommendation.

This action would not impose any additional reporting or recordkeeping requirements on either small or large pistachio handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule.

In addition, the Committee's meetings were widely publicized throughout the pistachio industry and all interested persons were encouraged to attend the meetings and participate in the Committee's deliberations on all issues. Like all Committee meetings, the November 3, December 15, 2004, and April 12, 2005, meetings, were public meetings and all entities, both large and small, were able to express their views on these issues. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab.html.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 7-day comment period is provided to allow interested persons to respond to this proposal. Seven days is deemed appropriate because any changes resulting from this proposed rule should be in place by mid-September. The beginning of harvest for the 2005–06 season is expected to start at the end of August and handlers are expected to begin reworking their lots of pistachios by mid-September. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 983

Pistachios, Marketing agreements and orders, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 983 is proposed to be amended as follows:

PART 983—PISTACHIOS GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 983 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. In part 983, Subpart—Rules and Regulations is amended by adding new §§ 983.138 and 983.143 to read as follows:

§ 983.138 Samples for testing.

Prior to testing, a sample shall be drawn from each lot and divided into two subsamples to be used to test pistachios for aflatoxin and for

minimum quality. The lot subsamples shall be of sufficient weight to comply with Tables 1 and 2 of § 983.38 and Table 4 of § 983.39: *Provided,* that lots of pistachios which are intended for dyeing or color-coating shall be sampled for minimum quality after the dyeing or color-coating process.

§ 983.143 Reinspection.

(a) Any lot of inshell pistachios that is pin-picked, hand-sorted, color-sorted, and/or resized is considered to be ''materially changed.'' Pistachios which are roasted, salted, flavored, air-legged, dyed, color-coated, cleaned, and otherwise subjected to similar processes are not considered to be materially changed.

(b) Each handler who handles pistachios shall cause any lot or portion of a lot initially certified for aflatoxin, quality, and size requirements, and subsequently materially changed, to be reinspected for aflatoxin, quality, and size, and certified as new lots: *Provided,* that: (1) Pursuant to § 983.41(b) handlers exempted from minimum quality testing shall pull or have pulled representative lot samples for aflatoxin testing of any materially changed lots intended to be shipped into the domestic channels of commerce. Such representative lot samples shall be divided into two parts, one part shall be retested for aflatoxin and the other part shall be maintained for 90 days at the handler's facilities. Handlers shall make the samples maintained for 90 days available for auditing by the Administrative Committee for Pistachios; and (2) handlers exempted from order requirements under § 983.70 are exempted from all reinspection requirements.

Dated: August 22, 2005.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 05–16981 Filed 8–23–05; 11:52 am]

BILLING CODE 3410–02–P

FEDERAL RESERVE SYSTEM

12 CFR Part 205

[Regulation E; Docket No. R–1234]

Electronic Fund Transfers

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule; official staff interpretation.

SUMMARY: The Board is publishing for comment a proposal to amend Regulation E, which implements the Electronic Fund Transfer Act (EFTA). The proposal would also revise the official staff commentary to the regulation. The commentary interprets the requirements of Regulation E to facilitate compliance primarily by financial institutions that offer electronic fund transfer services to consumers.

The proposed revisions would clarify the disclosure obligations of automated teller machine (ATM) operators with respect to fees imposed on a consumer for initiating an electronic fund transfer or a balance inquiry at an ATM. The Board is withdrawing previously proposed revisions to the Regulation E staff commentary that would have addressed this issue.

DATES: Comments must be received on or before October 7, 2005.

ADDRESSES: You may submit comments, identified by Docket No. R–1234, by any of the following methods:

- Agency Web site: *http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- E-mail: *regs.comments@federalreserve.gov.* Include docket number in the subject line of the message.
- FAX: 202/452–3819 or 202/452–3102.
- Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Ky Tran-Trong, Senior Attorney, or Daniel G. Lonergan, David A. Stein, Natalie E. Taylor or John C. Wood, Counsels, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, DC 20551, at (202) 452–2412 or (202) 452–3667. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

The Electronic Fund Transfer Act (EFTA or Act) (15 U.S.C. 1693 *et seq.*), enacted in 1978, establishes the rights, liabilities, and responsibilities of participants in electronic fund transfer (EFT) systems. The Board's Regulation E (12 CFR part 205) implements the EFTA. Examples of types of transfers covered by the Act and regulation include transfers initiated through an automated teller machine (ATM), point-of-sale (POS) terminal, automated clearinghouse (ACH), telephone bill-payment plan, or remote banking service. The Act and regulation require disclosure of terms and conditions of an EFT service; documentation of electronic transfers by means of terminal receipts and periodic account activity statements; limitations on consumer liability for unauthorized transfers; procedures for error resolution; and certain rights related to preauthorized EFTs.

The Official Staff Commentary (12 CFR part 205 (Supp. I)) is designed to facilitate compliance and provide protection from liability under sections 915 and 916 of the EFTA for financial institutions and persons subject to the Act. 15 U.S.C. 1593m(d)(1). The commentary is updated periodically, as necessary, to address significant questions that arise.

II. Summary of Proposed Revisions

Section 205.16 provides that an ATM operator that imposes a fee on a consumer for initiating an EFT or a balance inquiry must post notices at ATMs that a fee will be imposed. Section 205.16(b) would be revised to clarify the operation of the ATM signage rule when fees are not imposed by the ATM operator on all consumers. The revised language specifically clarifies the intent of the rule that ATM operators may provide a notice that a fee *may* be imposed if there are circumstances in which an ATM fee will not be charged for a particular transaction, such as where the card has been issued by a foreign bank or the card issuer has entered into a contractual relationship with the ATM operator regarding surcharges.

Section 205.16 does not require that any sign be posted if no fee is charged to the consumer by the ATM operator. The rule is intended to allow consumers to identify immediately ATMs that generally charge a fee for use. It is not intended to represent a complete disclosure to the consumer regarding the fees associated with the particular type of transaction the consumer seeks to conduct. Rather, a more detailed

disclosure of whether in fact a fee will be charged for the type of transaction contemplated by the consumer and the amount of the fee is required to be made either on the ATM screen or on an ATM receipt before the transaction is completed. *See* § 205.16(c).

III. Section-by-Section Analysis of the Proposed Revisions

Section 205.16 Disclosures at Automated Teller Machines

Under section 904(d) of the EFTA, as amended by the Gramm-Leach-Bliley Act of 1999 (GLB Act), an ATM operator that imposes a fee on any consumer for providing EFT services is required to provide notice of the fee to the consumer in a prominent and conspicuous location on or at the ATM on which the EFT is initiated.[1] An ATM operator is any person who operates an ATM at which consumers initiate an EFT or a balance inquiry, and that does not hold the account to or from which the transfer is made, or about which an inquiry is made. *See* EFTA 904(d)(3)(D)(i); § 205.16(a). In addition to posting notice of the fee on or at the ATM, the ATM operator must also disclose that a fee will be imposed and the amount of the fee, either on the screen of the ATM or on a paper notice, before the consumer is committed to completing the transaction. These requirements are implemented in § 205.16 of Regulation E. *See* 66 FR 13409 (March 6, 2001).

Several large institutions have asked whether it is permissible under § 205.16 to provide notice on the ATM that a fee ''may be'' charged for providing EFT services, because many ATM operators, in particular those owned or operated by banks, apply ATM surcharges to some categories of their ATM users, but not others. For example, an ATM operator might not charge a fee to cardholders of foreign banks, cardholders whose card issuer has entered into a special contractual relationship with the ATM operator with respect to surcharges, and persons who carry cards that are issued under electronic benefit transfer governmental programs. (While many financial institutions do not impose ATM surcharges on their own cardholders, they are not ATM operators with respect to those cardholders for purposes of § 205.16 because the institutions hold the cardholders' accounts.) Also, an ATM operator might charge a fee for cash withdrawals, but not for balance inquiries. As a result, a disclosure on the ATM that a fee ''will'' be imposed in all instances could be overly broad with respect to consumers who would not be assessed a fee for usage of the ATM.

In September 2004, as part of an update to Regulation E, the Board proposed to revise comment 205.16(b)(1)–1 to clarify that ATM operators may disclose on the ATM signage that a fee may be imposed or may specify the type of EFTs or consumers for which a fee is imposed, if there are circumstances in which an ATM surcharge will not be charged for a particular transaction. *See* 69 FR 55996, 56005 (September 17, 2004). The Board's proposal acknowledged that a strict requirement to post a notice that a fee will be imposed in all instances could result in an inaccurate disclosure of the ATM operators' surcharge practices and is not mandated by the current language in § 205.16.

Industry commenters overwhelmingly agreed with the Board's proposal, stating that the proposed staff commentary was consistent with sections 904(d)(3)(A) and (B) of the EFTA, and would help ATM operators more accurately disclose their surcharging practices. Industry commenters cited a press release issued by the original act's sponsor, Rep. Marge Roukema, stating that the act ''simply puts existing practice into law.'' [2] According to these commenters, the common practice of many banks at the time of the ATM surcharge amendments was to state that a fee *may* be imposed.

Consumer groups believed that a general statement on ATM signage that a fee ''may'' be imposed could significantly weaken consumer notice, and that the current staff commentary permitting ATM operators to specify the type of EFTs for which a fee is imposed provides sufficient flexibility to address concerns about overbroad ATM signage disclosures. A consumer rights attorney stated that a disclosure that an ATM fee ''may'' be imposed is too general to be useful, and further asserted that the Congress intended that ATM signs must state that a fee will be charged whenever there is a possibility that a surcharge will be imposed on any consumer. This commenter believed that section 904(d) of the EFTA did not provide a basis for ATM operators to avoid providing notice on ATM signage to consumers to whom a fee would be imposed even if some consumers would not have a fee imposed or if there are other transactions for which a fee would not be imposed. The commenter also challenged industry commenters' characterizations regarding common industry practice at the time the amendments were adopted, stating that existing practice of many ATM operators at the time was to post signs on the machines stating that a fee *will* be imposed for cash withdrawals.

The Board continues to believe that a literal interpretation of the current rule could lead to overly broad disclosures of an ATM operator's surcharge practices where some consumers would not be assessed a fee for usage of the ATM, and that a reasonable interpretation of the statute and regulation would allow ATM operators to provide an alternative disclosure that a fee ''may'' be imposed to avoid potential consumer confusion. Upon further analysis and after consideration of the comments received, however, the Board believes it would be appropriate to make this clarification in the regulation rather than in the commentary. Therefore, the Board is withdrawing its proposed commentary revisions addressing this issue and is instead proposing to exercise its authority under section 904(a) of the EFTA to amend both the regulation and the commentary. A re-proposal allows the Board to elicit additional comments to better understand ATM disclosure practices, both at the time of the passage of the GLB Act and currently.

As proposed, § 205.16(b) would be revised to explicitly clarify that ATM operators may disclose in all cases that a fee will be imposed, or in the alternative, disclose that a fee may be imposed on consumers initiating an EFT or a balance inquiry if there are circumstances under which some consumers would not be charged for such services. Before an ATM operator may impose an ATM fee on a consumer for initiating an electronic fund transfer or a balance inquiry, the ATM operator must provide to the consumer notice, either on-screen or via paper receipt, that an ATM fee will be imposed and the amount of the fee, and the consumer must elect to continue the transaction or inquiry after receiving such notice. *See* § 205.16(e). Comment 16(b)(1)–1 would be revised to reflect the proposed rule, and to clarify that ATM operators that impose an ATM surcharge in all cases must provide notice on the ATM signage that a fee *will* be charged.

Comment is solicited on the current disclosure practices of ATM operators that impose surcharges on some, but not all, consumers. Under what types of circumstances might an ATM operator not impose a surcharge for providing electronic transfer services or responding to balance inquiries? If

[1] Pub. L. 106–102, § 702, 113 Stat. 1338, 1463–64 (1999).

[2] Banking Committee OKs Roukema ATM Fee Disclosure (March 10, 1999), *http://financialservices.house.gov/banking/31099rou.htm.*

surcharges are not imposed on all consumers, how do ATM operators disclose their surcharge practices? What adverse impact on consumers, if any, might result from a disclosure that states that an ATM surcharge will be imposed when the operator's practice is not to impose a surcharge on certain consumers? Conversely, what adverse impact on consumers who are charged an ATM fee, if any, might result if ATM signage states that a fee may be imposed? In addition, comment is solicited on disclosure practices of ATM operators with respect to surcharges at the time the GLB Act was passed.

IV. Form of Comment Letters

Comment letters should refer to Docket No. R–1234 and, when possible, should use a standard typeface with a font size of 10 or 12; this will enable the Board to convert text submitted in paper form to machine-readable form through electronic scanning, and will facilitate automated retrieval of comments for review. Comments may be mailed electronically to *regs.comments@federalreserve.gov.*

V. Solicitation of Comments Regarding the Use of ''Plain Language''

Section 722 of the Gramm-Leach-Bliley Act of 1999 requires the Board to use ''plain language'' in all proposed and final rules published after January 1, 2000. The Board invites comments on whether the proposed rules are clearly stated and effectively organized, and how the Board might make the proposed text easier to understand.

VI. Initial Regulatory Flexibility Analysis

In accordance with section 3(a) of the Regulatory Flexibility Act, the Board has reviewed the proposed amendments to Regulation E. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

1. *Statement of the objectives of the proposal.* The Board is proposing revisions to Regulation E to allow ATM operators flexibility to disclose that ATM surcharges will or may be imposed on consumers initiating an EFT or a balance inquiry when there are circumstances under which such surcharges will not be charged.

The EFTA was enacted to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objective of the EFTA is the provision of individual consumer rights. 15 U.S.C. 1693. The EFTA and Regulation E require disclosure of terms and conditions of an EFT service; documentation of electronic transfers by means of terminal receipts and periodic statements; limitations on consumer liability for unauthorized transfers; procedures for error resolution; and certain rights related to preauthorized EFTs. The Act and regulation also prescribe restrictions on the unsolicited issuance of ATM cards and other access devices. The EFTA authorizes the Board to prescribe regulations to carry out the purpose and provisions of the statute. 15 U.S.C. 1693b(a). The Act expressly states that the Board's regulations may contain ''such classifications, differentiations, or other provisions, * * * as, in the judgment of the Board, are necessary or proper to carry out the purposes of [the Act], to prevent circumvention or evasion [of the act], or to facilitate compliance [with the Act].'' 15 U.S.C. 1693b(c). The Act also states that ''[i]f electronic fund transfer services are made available to consumers by a person other than a financial institution holding a consumer's account, the Board shall by regulation assure that the disclosures, protections, responsibilities, and remedies created by [the Act] are made applicable to such persons and services.'' 15 U.S.C. 1693b(d). The Board believes that the proposed revisions to Regulation E discussed above are within the Congress' broad grant of authority to the Board to adopt provisions that carry out the purposes of the statute.

2. *Small entities affected by the proposal.* The number of small entities affected by this proposal is unknown. ATM operators that do not impose ATM surcharges in all instances would be permitted to disclose that surcharges may be disclosed on signage appearing on ATMs. ATM operators that choose to make the proposed alternative disclosure may have to revise their signs on their ATMs.

3. *Other Federal rules.* The Board believes no Federal rules duplicate, overlap, or conflict with the proposed revisions to Regulation E.

4. *Significant alternatives to the proposed revisions.* The Board welcomes comment on any significant alternatives that would minimize the impact of the proposed rule on small entities.

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1), the Board reviewed the proposed rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The proposed rule contains requirements subject to the PRA. The collection of information that is required by this proposed rule is found in 12 CFR 205.16(c) and in Appendix A. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless it displays a currently valid OMB control number. The OMB control number is 7100–0200. This information is required to obtain a benefit for consumers and is mandatory (15 U.S.C. 1693 *et seq.*). The respondents/recordkeepers are for-profit financial institutions, including small businesses. Institutions are required to retain records for 24 months.

All depository institutions, of which there are approximately 19,300, potentially are affected by this collection of information because all depository institutions are potential ATM operators subject to Regulation E and are required to provide notice to consumers of an ATM surcharge, and thus are respondents for purposes of the PRA. However, the extent to which this collection of information affects a particular depository institution depends on the number of ATMs an institution operates.

The proposed revision is not expected to significantly increase the ongoing annual burden of Regulation E; rather this would be a one-time burden increase for those institutions that, although not required, decide to revise their ATM signage disclosures. For purposes of the PRA, the Federal Reserve estimates that it would take depository institutions, on average, 8 hours (one business day) to revise and update ATM signage; therefore, the Federal Reserve estimates that the total annual burden for all depository institutions for this requirement would be 154,400 hours. With respect to the 1,289 Federal Reserve-regulated institutions which must comply with Regulation E, it is estimated that the total annual burden for this requirement would be 10,312 hours.

The preceding estimate represents an average across all respondents and reflect variations between institutions based on their size, complexity, and practices. The other federal agencies are responsible for estimating and reporting to OMB the total paperwork burden for the institutions for which they have administrative enforcement authority. They may, but are not required to, use the Federal Reserve's burden estimates.

Because the records would be maintained at state member banks and the notices are not provided to the Federal Reserve, no issue of

confidentiality arises under the Freedom of Information Act.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility; (b) the accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the cost of compliance; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collection of information should be sent to Michelle Long, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 41, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (7100–0200), Washington, DC 20503.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed changes to the text of the regulation and staff commentary. New language is shown inside bold-faced arrows, while language that would be deleted is set off with bold-faced brackets. Comments are numbered to comply with **Federal Register** publication rules.

List of Subjects in 12 CFR Part 205

Consumer protection, Electronic fund transfers, Federal Reserve System, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Board proposes to amend 12 CFR part 205 and the Official Staff Commentary, as follows:

PART 205—ELECTRONIC FUND TRANSFERS (REGULATION E)

1. The authority citation for part 205 would continue to read as follows:

Authority: 15 U.S.C. 1693b.

2. Section 205.16 would be amended by republishing paragraph (b) and revising paragraph (c)(1) as follows:

§ 205.16 Disclosures on automated teller machines.

* * * * *

(b) *General.* An automated teller machine operator that imposes a fee on a consumer for initiating an electronic fund transfer or a balance inquiry shall—

(1) Provide notice that a fee will be imposed for providing electronic fund transfer services or a balance inquiry; and

(2) Disclose the amount of the fee.

(c) *Notice requirement.* An automated teller machine operator must comply with the following:

(1) *On the machine.* Post **[**the notice required by paragraph (b)(1) of this section**]** in a prominent and conspicuous location on or at the automated teller machine ► a notice that:

(i) A fee will be imposed for providing electronic fund transfer services or a balance inquiry; or

(ii) A fee may be imposed for providing electronic fund transfer services or a balance inquiry, but this notice may be substituted only if there are circumstances under which a fee will not be imposed for such services◄; and

(2) *Screen or paper notice.* Provide the notice required by paragraphs (b)(1) and (b)(2) of this section either by showing it on the screen of the automated teller machine or by providing it on paper, before the consumer is committed to paying a fee.

2. In Supplement I to part 205, under *Section 205.16—Disclosures at Automated Teller Machines,* under *16(b) General,* under Paragraph 16(b)(1), paragraph 1. would be revised.

SUPPLEMENT I TO PART 205—OFFICIAL STAFF INTERPRETATIONS

* * * * *

Section 205.16—Disclosures on Automated Teller Machines

1. *Specific notices.* An ATM operator that imposes a fee for a specific type of transaction►—◄ such as ►for◄ a cash withdrawal, but not ► for ◄a balance inquiry, ► or for some cash withdrawals (such as where the card was issued by a foreign bank or by a card issuer that has entered into a special contractual relationship with the ATM operator regarding surcharges), but not for others—◄ may provide a general **[**statement**]** ► notice ◄ on or at the ATM machine ◄ that a fee will ► or may ◄ be imposed for providing EFT services or may specify the type of EFT for which a fee is imposed. ► If, however, a fee will be imposed in all instances, the notice must state that a fee will be imposed.◄

* * * * *

By order of the Board of Governors of the Federal Reserve System, August 19, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–16801 Filed 8–24–05; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–129782–05]

RIN 1545–BE71

Special Rule Regarding Certain Section 951 Pro Rata Share Allocations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed amendments to regulations under section 951(a) of the Internal Revenue Code (Code) regarding a United States shareholder's pro rata share of a controlled foreign corporation's (CFC's) subpart F income, previously excluded subpart F income withdrawn from investment in less developed countries, and previously excluded subpart F income withdrawn from foreign base country shipping operations. These proposed regulations are intended to ensure that a CFC's earnings and profits for a taxable year attributable to a section 304 transaction will not be allocated in a manner that results in the avoidance of Federal income tax. These proposed regulations are also intended to ensure that earnings and profits of a CFC are not allocated to certain preferred stock in a manner inconsistent with the economic interest that such stock represents.

DATES: Written or electronic comments and requests for a public hearing must be received by October 24, 2005.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–129782–05), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–129782–05), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically, via the IRS Internet site at *http://www.irs.gov/regs* or via the Federal eRulemaking Portal at*http://www.regulations.gov* (IRS and REG–129782–05).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations,

Jefferson VanderWolk, (202) 622–3810; concerning submissions of comments and requests for a public hearing, Robin Jones, (202) 622–3521 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to 26 CFR part 1 under section 951(a) of the Code relating to the determination of a United States shareholder's pro rata share of a CFC's subpart F income, previously excluded subpart F income withdrawn from investment in less developed countries, and previously excluded subpart F income withdrawn from foreign base country shipping operations.

In general, section 951(a)(1) requires a United States shareholder that owns stock in a CFC to include its pro rata share of such amounts in its gross income. Pro rata share is defined in section 951(a)(2) of the Code as the amount:

(A) Which would have been distributed with respect to the stock which such shareholder owns (within the meaning of section 958(a)) in such corporation if on the last day in its taxable year on which the corporation is a [CFC] it had distributed pro rata to its shareholders an amount which bears the same ratio to its subpart F income for the taxable year, as the part of such year during which the corporation is a [CFC] bears to the entire year, reduced by

(B) The amount of distributions received by any other person during such year as a dividend with respect to such stock, but only to the extent of the dividend which would have been received if the distribution by the corporation had been the amount which bears the same ratio to the subpart F income of such corporation for the taxable year, as the part of such year during which such shareholder did not own (within the meaning of section 958(a)) such stock bears to the entire year.

A CFC's earnings and profits are allocated among different classes of the CFC's stock for the purpose of determining the pro rata share of the CFC's subpart F income or withdrawal of previously excluded subpart F income of a United States shareholder of such CFC under § 1.951–1(e). The IRS and Treasury Department are aware of certain transactions in which a CFC's earnings and profits and subpart F income for a taxable year are increased by a deemed dividend arising from a transaction described in section 304, with respect to which taxpayers take the position that the current regulations permit the allocation of earnings and profits between different classes of stock (*e.g.*, common stock and preferred stock) in a manner inconsistent with the economic interests in the CFC represented by the respective classes of stock. The IRS and Treasury Department believe that such allocations are inconsistent with the policies underlying subpart F. These proposed regulations would provide additional guidance to ensure results that are consistent with such economic interests.

Responding to regulations proposed under section 951 on August 6, 2004, and published in final form in this issue of the **Federal Register** (REG–129771–04), a commentator observed that U.S. shareholders of CFCs sometimes have caused mandatorily redeemable preferred stock with cumulative dividend rights to be issued to (or otherwise acquired by) foreign persons. Relying on the fact that the hypothetical distribution rule does not take into account the time value of money, the parties in these transactions provide a relatively high dividend rate on such stock but forego compounding on the accrued but unpaid dividends, which would generally be required in an arms' length transaction. This would inappropriately deflect subpart F income inclusions with respect to the U.S. shareholder's stock in the CFC. To address this concern, the proposed regulations provide a special allocation rule for such stock which would appropriately discount the amount of earnings and profits allocated to the preferred stock in annual hypothetical distributions.

Explanation of Provisions

A. Earnings and Profits From Certain Section 304 Transactions

Section 1.951–1(e) defines pro rata share for purposes of section 951(a) of the Code. Proposed § 1.951–1(e)(3)(v) adds a special rule that would modify the general rule of § 1.951–1(e)(3)(i) regarding the allocation of a CFC's current earnings and profits to more than one class of stock. The general rule provides for the allocation of current earnings and profits to different classes of stock on the basis of the respective amounts of such earnings and profits that would be distributed with respect to each class if such earnings and profits were distributed on the last day of the CFC's taxable year on which it is a CFC.

The special rule applies where a CFC has earnings and profits and subpart F income for its taxable year attributable to a transaction described in section 304 of the Code and that transaction is part of a plan a principal purpose of which is to avoid Federal income taxation by allocating the subpart F income resulting from the section 304 transaction disproportionately to a tax-indifferent party. Pursuant to the rule, such earnings and profits will be allocated to each class of stock of the CFC in accordance with the value of such class relative to all other classes.

In the absence of the special rule, the current earnings and profits of a CFC having a class of preferred stock with a fixed return and a class of common stock would be allocated under the general rule on the basis of a hypothetical distribution. Thus, the preferred stock would receive an allocation equal to the amount of the fixed return on the total investment in such stock, and the common stock would receive an allocation of the remainder of the earnings and profits. This result would not reflect the actual economic interest in the CFC of the respective classes of stock in a case where the earnings and profits were artificially inflated as a result of the dividend arising from the section 304 transaction. The amount allocated to the preferred stock in such a case under the general rule would be a significantly smaller percentage of the total than the percentage of the corporation's value represented by the preferred stock.

This is illustrated by the example that would be added to § 1.951–1(e)(6) by these proposed regulations. By modifying the allocation of earnings and profits to classes of stock in this limited category of cases, the proposed regulations ensure that the allocation will be consistent with the economic interest in the CFC represented by the respective classes of stock.

B. Certain Cumulative Preferred Stock

Proposed § 1.951–1(e)(4)(ii) would add a special rule that would determine the hypothetical distribution of earnings and profits with respect to cumulative preferred stock with a mandatory redemption date by reflecting the present value of accrued but unpaid dividends with respect to such stock, determined generally on the basis of the implied annual rate of return on such stock and the length of time between the current year's hypothetical distribution date and the mandatory redemption date. This special rule would apply only if the rate of compounding on the accrued but unpaid cumulative dividends would be less than the appropriate applicable Federal rate and if a distribution on the stock would not be included in the gross income of a United States taxpayer.

Proposed Effective Dates

Sections 1.951–1(e)(3)(v) and 1.951–1(e)(4)(ii) are proposed to apply for taxable years of a controlled foreign corporation beginning on or after January 1, 2006.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and because these regulations do not impose a collection of information on small entities, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department specifically request comments regarding appropriate rules for determining under section 951 the hypothetical distribution of earnings and profits for cumulative preferred stock that does not have a mandatory redemption date, or that is subject to a shareholder-level agreement, such as a purchase option, to take into account the present value of accrued but unpaid dividends. The IRS and Treasury Department contemplate that if promulgated, such rules would be effective for taxable years of a controlled foreign corporation beginning on or after January 1, 2006.

The IRS and Treasury Department also request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Jefferson VanderWolk of the Office of the Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Par. 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *.

Par. 2. Section 1.951–1 is amended by revising paragraphs (e)(3)(v), (e)(4)(ii), (e)(6) *Example 9,* and (e)(7).

The revisions read as follows:

§ 1.951–1 Amounts included in gross income of United States shareholders.

* * * * *

(e) * * *

(3) * * *

(v) *Earnings and profits attributable to certain section 304 transactions.* For taxable years of a controlled foreign corporation beginning on or after January 1, 2006, if a controlled foreign corporation has more than one class of stock outstanding and the corporation has earnings and profits and subpart F income for a taxable year attributable to a transaction described in section 304, and such transaction is part of a plan a principal purpose of which is the avoidance of Federal income taxation, the amount of such earnings and profits allocated to any one class of stock shall be that amount which bears the same ratio to the remainder of such earnings and profits as the value of all shares of such class of stock, determined on the hypothetical distribution date, bears to the total value of all shares of all classes of stock of the corporation, determined on the hypothetical distribution date.

(4) * * * (i) * * *

(ii) *Certain cumulative preferred stock.* For taxable years of a controlled foreign corporation beginning on or after January 1, 2006, if a controlled foreign corporation has one or more classes of preferred stock with a mandatory redemption date and cumulative dividend rights, arrearages on which compound at a rate less than an annual compounding at the applicable Federal rate (as defined in section 1274(d)(1)) (AFR) that applies on the date the stock is issued for the term from such issue date to the mandatory redemption date, then, to the extent that—

(A) A distribution with respect to such stock on the hypothetical distribution date would not be includible in the gross income of a citizen or individual resident of the United States, a domestic corporation, or a foreign person as income effectively connected with such foreign person's conduct of a trade or business in the United States; and

(B) Any dividends accruing with respect to such stock during the taxable year of the controlled foreign corporation have not been paid during such taxable year (accrued but unpaid dividends), the amount of earnings and profits that shall be considered to be distributed as part of the hypothetical distribution for purposes of paragraph (e)(3)(i) of this section with respect to such stock shall be equal to the present value of such accrued but unpaid dividends for the taxable year. The present value of such accrued but unpaid dividends for the taxable year is determined for the purposes of this paragraph by discounting such accrued but unpaid dividends for that taxable year from the mandatory redemption date to the hypothetical distribution date using the implied annual rate of return on an investment at par in a share of such stock that is held from the date of issue until the mandatory redemption date, on the assumption that no dividends with respect to the stock are paid prior to redemption.

* * * * *

(6) * * *

Example 9. (i) *Facts.* In 2006, FC10, a controlled foreign corporation within the meaning of section 957(a), has outstanding 100 shares of common stock and 100 shares of 6-percent, voting, preferred stock with a par value of $10x per share. All of the common stock is held by Corp H, a foreign corporation which invested $1000x in FC10 in exchange for the common stock. All of FC10's preferred stock is held by Corp J, a domestic corporation which invested $1000x in FC10 in exchange for the FC10 preferred stock. The value of the common stock of FC10 at all relevant times is $1000x and the value of the preferred stock of FC10 at all relevant times is also $1000x. In 2006, FC10 borrows $3000x from a bank and invests $5000x in preferred stock issued by FC11, a foreign corporation owned by Corp J. FC11, which has no current or accumulated earnings and profits, uses the proceeds to lend $5000x to Corp J. In 2008, FC10 sells the FC11 preferred stock to FC12, a wholly owned foreign subsidiary of FC11 that has $5000x of accumulated earnings and profits, for $5000x in a transaction described in section 304. FC10 repays the bank loan in full. The acquisition and sale of the FC11 preferred stock by FC10 was part of a plan a principal purpose of which was the avoidance of Federal income tax. For 2008, FC10 has $5000x of earnings and profits, all of which is subpart F income attributable to

a deemed dividend arising from FC10's sale of the FC11 preferred stock to FC12.

(ii) *Analysis.* FC10 has $5000x of earnings and profits for 2008 attributable to a dividend from a section 304 transaction which was part of a plan a principal purpose of which was the avoidance of Federal income taxation. Under paragraph (e)(3)(v) of this section, these earnings and profits are allocated to the common and preferred stock of FC10 in accordance with the relative value of each class of stock. Thus, for taxable year 2008, $2500x is allocated to FC10's common stock and $2500x is allocated to its preferred stock.

(7) *Effective dates.* Except as provided in paragraphs (e)(3)(v) and (e)(4)(ii) of this section, this paragraph (e) applies for taxable years of a controlled foreign corporation beginning on or after January 1, 2005. * * *

* * * * *

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 05–16610 Filed 8–24–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–133578–05]

RIN 1545–BE74

Dividends Paid Deduction for Stock Held in Employee Stock Ownership Plan

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under sections 162(k) and 404(k) of the Internal Revenue Code (Code) relating to employee stock ownership plans (ESOPs). The regulations provide guidance concerning which corporation is entitled to the deduction for applicable dividends under section 404(k). These regulations also clarify that a payment in redemption of employer securities held by an ESOP is not deductible. These regulations will affect administrators of, employers maintaining, participants in, and beneficiaries of ESOPs. In addition, they will affect corporations that make distributions in redemption of stock held in an ESOP.

DATES: Written or electronic comments and requests for a public hearing must be received by November 23, 2005.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–133578–05), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–133578–05), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically directly to the IRS Internet site at *http://www.irs.gov/regs,* or via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS–REG–133578–05).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, John T. Ricotta at (202) 622–6060 with respect to section 404(k) or Martin Huck at (202) 622–7750 with respect to section 162(k); concerning submission of comments or to request a public hearing, Robin Jones at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

This document contains proposed regulations under sections 162(k) and 404(k) of the Internal Revenue Code (Code). These regulations address two issues that have arisen in the application of these sections. The first issue arises in a case in which the applicable employer securities held in an employee stock ownership plan (ESOP) are not securities of the corporation or corporations that maintain the plan. The issue is which corporation is entitled to the deduction under section 404(k) for certain dividends paid with respect to the stock held in the ESOP. The second issue is whether payments in redemption of stock held by an ESOP are deductible.

Code and Regulations

Section 404(a) provides that contributions paid by an employer to or under a stock bonus, pension, profit sharing, or annuity plan are deductible under section 404(a), if they would be otherwise deductible, within the limitations of that section. Section 404(k)(1) provides that, in the case of a C corporation, there is allowed as a deduction for a taxable year the amount of any applicable dividend paid in cash by such corporation during the taxable year with respect to applicable employer securities held by an ESOP. The deduction under section 404(k) is in addition to the deductions allowed under section 404(a).

Section 4975(e)(7) provides, in relevant part, that an ESOP is a defined contribution plan that is a stock bonus plan qualified under section 401(a) and designed to invest primarily in qualifying employer securities. Section 4975(e)(8) states that the term *qualifying employer security* means any employer security within the meaning of section 409(l). Section 409(l) generally provides that the term *employer security* means common stock issued by the employer (or a corporation that is a member of the same controlled group) that is readily tradable on an established securities market, if the corporation (or a member of the controlled group) has common stock that is readily tradable on an established securities market. Section 409(l)(4)(A) provides that, for purposes of section 409(l), the term *controlled group of corporations* has the meaning given to that term by section 1563(a) (determined without regard to subsections (a)(4) and (e)(3)(C) of section 1563). Section 409(l)(4)(B) provides that, for purposes of section 409(l)(4)(A), if a common parent owns directly stock possessing at least 50 percent of the voting power of all classes of stock and at least 50 percent of each class of nonvoting stock in a first tier subsidiary, such subsidiary (and all corporations below it in the chain which would meet the 80 percent test of section 1563(a) if the first tier subsidiary were the common parent) are treated as includible corporations.

Section 404(k)(2), for taxable years beginning on or after January 1, 2002, generally provides that the term *applicable dividend* means any dividend which, in accordance with the plan provisions—(i) is paid in cash to the participants in the plan or their beneficiaries, (ii) is paid to the plan and is distributed in cash to participants in the plan or their beneficiaries not later than 90 days after the close of the plan year in which paid, (iii) is, at the election of such participants or their beneficiaries—(I) payable as provided in clause (i) or (ii), or (II) paid to the plan and reinvested in qualifying employer securities, or (iv) is used to make payments on a loan described in section 404(a)(9), the proceeds of which were used to acquire the employer securities (whether or not allocated to participants) with respect to which the dividend is paid. Under section 404(k)(4), the deduction is allowable in the taxable year of the corporation in which the dividend is paid or distributed to a participant or beneficiary.

Prior to 2002, section 404(k)(5)(A) provided that the Secretary may disallow the deduction under section 404(k) for any dividend if the Secretary determines that such dividend constitutes, in substance, an evasion of

taxation. Section 662(b) of the Economic Growth and Tax Relief Reconciliation Act of 2001 (115 Stat. 38, 2001) amended section 404(k)(5)(A) to provide that the Secretary may disallow a deduction under section 404(k) for any dividend the Secretary determines constitutes, in substance, an avoidance or evasion of taxation. The amendment is effective for tax years after December 31, 2001.

Section 162(k)(1) generally provides that no deduction otherwise allowable under chapter 1 of the Code is allowed for any amount paid or incurred by a corporation in connection with the reacquisition of its stock or the stock of any related person (as defined in section 465(b)(3)(C)). The legislative history of section 162(k) states that the phrase ''in connection with'' is ''intended to be construed broadly.'' H.R. Conf. Rep. No. 99–841, at 168 (1986).

Corporation Entitled to Section 404(k) Deduction

An ESOP may benefit employees of more than one corporation. In addition, an ESOP may be maintained by a corporation other than the payor of a dividend. In these cases, the issue arises as to which entity is entitled to the deduction provided under section 404(k). Assume, for example, that a publicly traded corporation owns all of the stock of a subsidiary. The subsidiary operates a trade or business with employees in the U.S. and maintains an ESOP that holds stock of its parent for its employees. If the parent distributes a dividend with respect to its stock held in the ESOP maintained by the subsidiary, questions have arisen as to whether the parent or subsidiary is entitled to the deduction under section 404(k). This question arises in cases in which the parent and subsidiary file a consolidated return as well as in cases in which the parent and subsidiary do not file a consolidated return.

The IRS and Treasury Department believe that the statutory language of section 404(k) clearly provides that only the payor of the applicable dividend is entitled to the deduction under section 404(k), regardless of whether the employees of multiple corporations benefit under the ESOP and regardless of whether another member of the controlled group maintains the ESOP. Therefore, in the example above, the parent, not the subsidiary, is entitled to the deduction under section 404(k).

Treatment of Payments Made To Reacquire Stock

Some corporations have claimed deductions under section 404(k) for payments in redemption of stock held by an ESOP that are used to make benefit distributions to participants or beneficiaries, including distributions of a participant's account balance upon severance from employment. These taxpayers have argued that the payments in redemption qualify as dividends under sections 301 and 316 and, therefore, are deductible under section 404(k).

In Rev. Rul. 2001–6 (2001–1 C.B. 491), the IRS concluded that section 162(k) bars a deduction for payments made in redemption of stock from an ESOP. This conclusion was based on the fact that section 162(k)(1) disallows a deduction for payments paid in connection with the reacquisition of an issuer's stock and that the redemption payments are such payments. The IRS also concluded that such payments were not applicable dividends under section 404(k)(1). The IRS reasoned that allowing a deduction for redemption amounts would vitiate important rights and protections for recipients of ESOP distributions, including the right to reduce taxes by utilizing the return of basis provisions under section 72, the right to make rollovers of ESOP distributions received upon separation from service, and the protection against involuntary cash-outs. Finally, the IRS stated that a deduction under section 404(k)(1) for such amounts would constitute, in substance, an evasion of tax.

In *Boise Cascade Corporation* v. *United States*, 329 F.3d 751 (9th Cir. 2003), the Court of Appeals for the Ninth Circuit held that payments made by a corporation to redeem its stock held by its ESOP were deductible as dividends paid under section 404(k), and that the deduction was not precluded by section 162(k). The court reasoned that the distribution by the ESOP of the redemption proceeds to the participants was a transaction separate from the redemption transaction. Therefore, the court concluded that the distribution did not constitute a payment *in connection with* the corporation's reacquisition of its stock, and section 162(k) did not bar the deduction of such payments.

For the reasons stated in Rev. Rul. 2001–6, the IRS and Treasury Department continue to believe that allowing a deduction for amounts paid to reacquire stock is inconsistent with the intent of, and policies underlying, section 404. In addition, the IRS and Treasury Department believe that allowing such a deduction would constitute, in substance, an avoidance or evasion of taxation within the meaning of section 404(k)(5)(A) because it would allow a corporation to claim two deductions for the same economic cost: once for the value of the stock originally contributed to the ESOP and again for the amount paid to redeem the same stock. See *Charles Ilfeld Co.* v. *Hernandez*, 292 U.S. 62 (1934). Moreover, despite the Ninth Circuit's conclusion in *Boise Cascade,* the IRS and Treasury Department continue to believe that, even if a payment in redemption of stock held by an ESOP were to qualify as an applicable dividend, section 162(k) would disallow a deduction for that amount because such payment would be in connection with the reacquisition of the corporation's stock.

This notice of proposed rulemaking, therefore, includes proposed regulations under section 404(k) that confirm that payments made to reacquire stock held by an ESOP are not deductible under section 404(k) because such payments do not constitute applicable dividends under section 404(k)(2) and a deduction for such payments would constitute, in substance, an avoidance or evasion of taxation within the meaning of section 404(k)(5). It also includes proposed regulations under section 162(k) that provide that section 162(k), subject to certain exceptions, disallows any deduction for amounts paid or incurred by a corporation in connection with the reacquisition of its stock or the stock of any related person (as defined in section 465(b)(3)(C)). The proposed regulations also provide that amounts paid or incurred in connection with the reacquisition of stock include amounts paid by a corporation to reacquire its stock from an ESOP that are then distributed by the ESOP to its participants (or their beneficiaries) or otherwise used in a manner described in section 404(k)(2)(A).

Proposed Effective Date

These regulations are proposed to be effective on the date of issuance of final regulations. However, before these regulations become effective, the IRS will continue to assert in any matter in controversy outside of the Ninth Circuit that sections 162(k) and 404(k) disallow a deduction for payments to reacquire employer securities held by an ESOP. See Chief Counsel Notice 2004–038 (October 1, 2004) available at *http://www.irs.gov/foia* through the *electronic reading room*.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure

Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department specifically request comments on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these regulations are John T. Ricotta, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities) and Martin Huck of Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and Treasury participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *.

Section 1.162(k)–1 is also issued under 26 U.S.C. 162(k) * * *.

Section 1.404(k)–3 is also issued under 26 U.S.C. 162(k) and 404(k)(5)(A) * * *.

Par. 2. Section 1.162(k)–1 is added to read as follows:

§ 1.162(k)–1 Disallowance of deduction for reacquisition payments.

(a) *In general.* Except as provided in paragraph (b) of this section, no deduction otherwise allowable is allowed under Chapter 1 of the Internal Revenue Code for any amount paid or incurred by a corporation in connection with the reacquisition of its stock or the stock of any related person (as defined in section 465(b)(3)(C)). Amounts paid or incurred in connection with the reacquisition of stock include amounts paid by a corporation to reacquire its stock from an ESOP that are used in a manner described in section 404(k)(2)(A). See § 1.404(k)–3.

(b) *Exceptions.* Paragraph (a) of this section does not apply to any—

(i) Deduction allowable under section 163 (relating to interest);

(ii) Deduction for amounts that are properly allocable to indebtedness and amortized over the term of such indebtedness;

(iii) Deduction for dividends paid (within the meaning of section 561); or

(iv) Amount paid or incurred in connection with the redemption of any stock in a regulated investment company that issues only stock which is redeemable upon the demand of the shareholder.

(c) *Effective date.* This section applies with respect to amounts paid or incurred on or after the date these regulations are published as final regulations in the **Federal Register**.

Par. 3. Section 1.404(k)–2 is added to read as follows:

§ 1.404(k)–2 Dividends paid by corporation not maintaining ESOP.

Q–1: What corporation is entitled to the deduction provided under section 404(k) for applicable dividends paid on applicable employer securities of a C corporation held by an ESOP if the ESOP benefits employees of more than one corporation or if the corporation paying the dividend is not the corporation maintaining the plan?

A–1: (a) *In general.* Under section 404(k), only the corporation paying the dividend is entitled to the deduction with respect to applicable employer securities held by an ESOP. Thus, no deduction is permitted to a corporation maintaining the ESOP if that corporation does not pay the dividend.

(b) *Example.* (i) *Facts.* S is a U.S. corporation that is wholly owned by P, an entity organized under the laws of Country A that is classified as a corporation for Federal income tax purposes. P is not engaged in a U.S. trade or business. P has a single class of common stock that is listed on a stock exchange in a foreign country. In addition, these shares are listed on the New York Stock Exchange, in the form of American Depositary Shares, and are actively traded through American Depositary Receipts (ADRs) meeting the requirements of section 409(l). S maintains an ESOP for its employees. The ESOP holds ADRs of P on Date X and receives a dividend with respect to those employer securities. The dividends received by the ESOP constitute applicable dividends as described in section 404(k)(2).

(ii) *Conclusion.* P, as the payor of the dividend, is entitled to a deduction under section 404(k) with respect to the dividends, although as a foreign corporation P does not obtain a U.S. tax benefit from the deduction. No corporation other than the corporation paying the dividend is entitled to the deduction under section 404(k). Thus, because S did not pay the dividends, S is not entitled to a deduction under section 404(k). The answer would be the same if P is a U.S. C corporation.

Q–2: What is the effective date of this section?

A–2: This section applies with respect to dividends paid on or after the date these regulations are published as final regulations in the **Federal Register**.

Par. 4. Section 1.404(k)–3 is added to read as follows:

§ 1.404(k)–3 Disallowance of deduction for reacquisition payments.

Q–1: Are payments to reacquire stock held by an ESOP applicable dividends that are deductible under section 404(k)(1)?

A–1: (a) Payments to reacquire stock held by an ESOP, including reacquisition payments that are used to make benefit distributions to participants or beneficiaries, are not deductible under section 404(k) because—

(1) Those payments do not constitute applicable dividends under section 404(k)(2); and

(2) The treatment of those payments as *applicable dividends* would constitute, in substance, an avoidance or evasion on taxation within the meaning of section 404(k)(5).

(b) See § 1.162(k)–1 concerning the disallowance of deductions for amounts paid or incurred by a corporation in connection with the reacquisition of its stock from an ESOP.

Q–2: What is the effective date of this section?

A–2: This section applies with respect to payments to reacquire stock that are made on or after the date these

regulations are published as final regulations in the **Federal Register**.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 05–16715 Filed 8–24–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08–05–041]

RIN 1625–AA09

Drawbridge Operation Regulation; Tennessee River, Chattanooga, TN

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to change the regulation governing the Chief John Ross Drawbridge, mile 464.1, across the Tennessee River at Chattanooga, Tennessee. Under the proposed rule, the drawbridge need not open for river traffic and may remain in the closed-to-navigation position from 8 a.m., December 1, 2005 until 8 a.m., July 1, 2006. This proposed rule would allow the drawbridge to be maintained in the closed-to-navigation position to allow major repair work to be performed on the bridge.

DATES: Comments and related material must reach the Coast Guard on or before September 26, 2005.

ADDRESSES: You may mail comments and related material to Commander, Eighth Coast Guard District, Bridge Branch, Robert A. Young Federal Building, 1222 Spruce Street, St. Louis, MO 63103–2832. Commander (obr) maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at room 2.107f in the Robert A. Young Federal Building, Eighth Coast Guard District, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Roger K. Wiebusch, Bridge Administrator, (314) 539–3900, extension 2378.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD08–05–041), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to the Eighth Coast Guard District, Bridge Branch, at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that a meeting would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

On February 11, 2005, the State of Tennessee Department of Transportation requested a temporary change to the operation of the Chief John Ross Drawbridge, across the Tennessee River, mile 464.1, at Chattanooga, Tennessee to allow the drawbridge to remain in the closed-to-navigation position for seven months to perform major repairs to the bridge. The drawbridge has a vertical clearance of 58.7 feet above normal pool in the closed-to-navigation position. Navigation on the waterway consists primarily of commercial tows and recreational watercraft that will be minimally impacted by the closure period. Presently, the draw opens on signal for the passage of river traffic when the vertical clearance beneath the draw is 50 feet or less. When the vertical clearance beneath the draw is more than 50 feet, at least eight hours notice is required. The Tennessee Department of Transportation requested the drawbridge be permitted to remain in the closed-to-navigation position from 8 a.m., December 1, 2005 until 8 a.m. July 1, 2006. This temporary change to the drawbridge's operation has been coordinated with the commercial waterway operators.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security.

The Coast Guard expects that this temporary change to operation of the Chief John Ross Drawbridge will have minimal economic impact on commercial traffic operating on the Tennessee River. This temporary change has been written in such a manner as to allow for minimal interruption of the drawbridges regular operation.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule will be in effect for seven months and the Coast Guard expects the impact of this action to be minimal because the existing vertical clearance of 58.7 feet above normal pool in the closed-to-navigation position will still allow vessels to transit beneath the bridge.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions

concerning its provisions or options for compliance, please contact Mr. Roger K. Wiebusch, Bridge Administrator, Eighth Coast Guard District, Bridge Branch, at (314) 539–3900, extension 2378.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Government Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore this rule is categorically excluded under figure 2–1, paragraph 32(e) of the Instruction from further environmental documentation.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; Department of Homeland Security Delegation No. 0170.1; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

2. From 8 a.m., December 1, 2005 until 8 a.m., July 1, 2006, suspend section 117.949 and add a new section 117.T948 to read as follows:

§ 117.T948 Tennessee River.

(a) The Chief John Ross Drawbridge, Mile 464.1, at Chattanooga, Tennessee need not open for river traffic and may be maintained in the closed-to-navigation position from 8 a.m., December 1, 2005 until 8 a.m., July 1, 2006.

(b) The draw of the Southern Railway Bridge over the Tennessee River, mile 470.7, at Hixon, Tennessee, shall open on signal when the vertical clearance beneath the draw is 50 feet or less. When the vertical clearance beneath the draw is more than 50 feet, at least eight hours notice is required. When the operator of a vessel returning through the draw within four hours informs the drawtender of the probable time of return, the drawtender shall return one half hour before the time specified and promptly open the draw on signal for the vessel without further notice. If the vessel giving notice fails to arrive within one hour after the arrival time specified, whether upbound or downbound, a second eight hours notice is required. Clearance gages of a type acceptable to the Coast Guard shall be installed on both sides of each bridge.

Dated: August 5, 2005.

Kevin L. Marshall,

Captain, U.S. Coast Guard, Commander, 8th Coast Guard Dist. Acting.

[FR Doc. 05–16859 Filed 8–24–05; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 041108310–5222–03; I.D. 100104H]

RIN 0648–AS78

List of Fisheries for 2005

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of availability; proposed rule; reopening of public comment period.

SUMMARY: On December 2, 2004, the proposed List of Fisheries (LOF) for 2005 under the Marine Mammal Protection Act (MMPA) was published in the **Federal Register**. NMFS subsequently prepared a draft Environmental Assessment (EA) on the process for classifying U.S. commercial fisheries on the LOF. NMFS is reopening the comment period on the proposed 2005 LOF for an additional 60 days to allow the public to concurrently review and comment on both the draft EA and proposed 2005 LOF.

DATES: Comments must be received by October 24, 2005.

ADDRESSES: Send comments on the proposed 2005 LOF and draft EA to Chief, Marine Mammal Conservation Division, Attn: List of Fisheries, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910. Comments may also be sent via email to *2005LOF.comments@noaa.gov* or the Federal eRulemaking portal: *http://www.regulations.gov* (Follow instructions for submitting comments).

Comments regarding the burden-hour estimates, or any other aspect of the collection of information requirements contained in the proposed rule, should be submitted in writing to the Chief, Marine Mammal Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910 and to David Rostker, OMB, by e-mail at *David__Rostker@omb.eop.gov* or by fax to 202–395–7285.

Copies of the draft EA for this action are available on the NMFS Office of Protected Resources website, which is listed under the Electronic Access portion of this document.

FOR FURTHER INFORMATION CONTACT: Kristy Long, Office of Protected Resources, 301–713–2322; David Gouveia, Northeast Region, 978–281–9300; Juan Levesque, Southeast Region, 727–551–5779; Cathy Campbell, Southwest Region, 562–980–4060; Brent Norberg, Northwest Region, 206–526–6733; Bridget Mansfield, Alaska Region, 907–586–7642; Chris Yates, Pacific Islands Region, 808–944–2235. Individuals who use a telecommunications device for the hearing impaired may call the Federal Information Relay Service at 1–800–877–8339 between 8 a.m. and 4 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

The proposed 2005 LOF **Federal Register** notice and draft EA for this action can be downloaded from the NMFS Office of Protected Resources website at *http://www.nmfs.noaa.gov/pr/interactions/lof/*.

Background

On December 2, 2004, the proposed List of Fisheries for 2005 under the Marine Mammal Protection Act was published in the **Federal Register** (69 FR 70094). NMFS must categorize each commercial fishery on the LOF into one of three categories under the MMPA based on the level of serious injury and mortality of marine mammals that occurs incidental to the fishery. NMFS must publish in the **Federal Register** any necessary changes to the LOF after notice and opportunity for public comment. In the proposed LOF for 2005, NMFS proposed several fishery classification, fishery name, and organizational changes. In particular, NMFS proposed to reclassify the California/Oregon thresher shark/swordfish drift gillnet (≥14 in. mesh) from Category II (occasional incidental mortality and serious injury) to Category I (frequent incidental mortality and serious injury) and to reclassify the Northeast bottom trawl, Mid-Atlantic bottom trawl, and five Alaska fisheries from Category III (remote likelihood of or no known incidental mortality and serious injury) to Category II. The five Alaska fisheries include the following: Bering Sea and Aleutian Islands (BSAI) flatfish trawl, BSAI Greenland turbot longline, BSAI pollock trawl, Bering Sea sablefish pot, and Gulf of Alaska Pacific cod longline.

NMFS extended the comment period on the proposed 2005 LOF for an additional 30 days (70 FR 776, January 5, 2005). In that **Federal Register** notice, NMFS also announced its intent to prepare an EA on the process for classifying fisheries on the LOF. NMFS is reopening the comment period on this proposed action to allow the public an opportunity to review and comment on the draft EA and supplement any previous comments on the proposed 2005 LOF. Therefore, NMFS is reopening the public comment period on the proposed LOF for 2005 for an additional 60 days.

Dated: August 22, 2005.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 05–16939 Filed 8–24–05; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 70, No. 164

Thursday, August 25, 2005

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

August 22, 2005.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: 7 CFR Part 235 State Administrative Expense Funds.

OMB Control Number: 0584–0067.

Summary of Collection: Because the Food and Nutrition Service (FNS) is accountable for State Administrative Expense (SAE) funds by fiscal year, State Agencies (SAs) are requested to report their SAE budget information on that basis. If the State budgets coincide with a fiscal year other than that used by the Federal government, the SA must convert its State budget figures to amounts to be used during the applicable Federal fiscal year for this purpose. Under 7 CFR part 235, State Administrative Expense Funds, there are five reporting requirements, which necessitate the collection of information. They are as follows: SAE Plan, Reallocation Report, Coordinated Review Effort (CRE) Data Base Update, Report of SAE Funds Usage, and Responses to Sanctions. SAs also must maintain records pertaining to SAE. These include Ledger Accounts, Source Documents, Equipment Records and Record on State Appropriated Funds. FNS will collect information using forms FNS–74 and 525.

Need and Use of the Information: FNS will collect information on the total SAE cost the SA expects to incur in the course of administering the Child Nutrition Programs (CNP); the indirect cost rate used by the SA in charging indirect cost to SAE, together with the name of the Federal agency that assigned the rate and the date the rate was assigned; breakdown of the current year's SAE budget between the amount allocated for the current year and the amount carried over from the prior year; and the number and types of personnel currently employed in administering the CNPs. The information is used to determine whether SA intends to use SAE funds for purposes allowable under OMB Circular A–87, Cost Principles for State and Local Governments; does SA's administrative budget provide for sufficient funding from State sources to meet the Maintenance of Effort requirement; and is SA's staff adequate to effectively administer the programs covered by the SA's agreement with FNS.

Description of Respondents: State, local or tribal government.

Number of Respondents: 88.

Frequency of Responses: Recordkeeping; Reporting: Annually.

Total Burden Hours: 14,900.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 05–16904 Filed 8–24–05; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Site-Specific Invasive Plant Treatment Project—Olympic National Forest, Washington

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The USDA Forest Service will prepare an Environmental Impact Statement (EIS) to document and disclose the potential environmental effects of proposed invasive plant treatments. The Proposed Action is to apply a combination of herbicide, mechanical and manual treatments to control known invasive plants within approximately 3,830 acres in 99 treatment areas on the Olympic National Forest in Washington. The Proposed Action would also establish criteria for responding to infestations that cannot be predicted.

This notice revises the Notice of Intent to prepare an EIS announced in the **Federal Register** on February 23, 2004. Four national forests were combined for analysis in the 2004 NOI. Currently, the Forest Service intends to prepare three separate site-specific statements: one for the Olympic National Forest, one for the Gifford-Pinchot National Forest and the northern portion of the Columbia River Gorge National Scenic Area in Washington, and one for the Mount Hood National Forest and the southern portion of the Columbia River Gorge National Scenic Area in Oregon. The project has been refined partly in response to comments received during the initial scoping period.

DATES: Written comments concerning the scope of this analysis should be received by September 15, 2005 if

possible to ensure they are fully incorporated into the Draft EIS.

ADDRESSES: Submit comments to Doug Jones, Mt. Hood National Forest, 6780 Hwy. 35, Mt. Hood, OR 97041. Electronic comments can be submitted to *comments-pacificnorthwest-mthood-hoodriver@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Doug Jones, 541.352.6002 or *dgjones@fs.fed.us.*

SUPPLEMENTARY INFORMATION:

Need for the Proposal

Invasive plants are compromising the ability for the Forest Service to manage for healthy native ecosystems. Invasive plants create a host of environmental and other effects, most of which are harmful to native ecosystem processes, including: displacement of native plants; reduction in functionality of habitat and forage for wildlife and livestock; loss of threatened, endangered, and sensitive species; increased soil erosion and reduced water quality; alteration of physical and biological properties of soil, including reduced soil productivity; changes to the intensity and frequency of fires; high cost (dollars spent) of controlling invasive plants; and loss of recreational opportunities.

Approximately 3,830 acres of invasive, non-native plants on the Olympic National Forest are proposed for treatment. These infestations have a high potential to expand and further degrade the National Forest and other lands. Infested areas represent potential seed sources for further invasion into neighboring ownerships.

There is an underlying need on for timely suppression, containment, control, and/or eradication of invasive plants on the Olympic National Forest so that desired environmental and social conditions (healthy native plant populations and little spread to neighboring lands) may be achieved. These control objective terms are based on the Final Environmental Impact Statement, Pacific Northwest Region—Preventing and Managing Invasive Plants: Eradication: Elimination of an invasive plant species from an area. Control: Infestation size reduced over time; some level of infestation may be acceptable. Containment: Spread of the weed prevented beyond the perimeter of patches or infestation areas mapped from current inventories. Suppression: Invasive plant seed production prevented throughout the target patch; invasive species does not dominate the vegetation of the area; low levels may be acceptable. Without action, invasive plant populations will continue to have adverse effects on national forest system and adjacent lands.

Proposed Action

The Proposed Action for this project is to apply site-specific treatment prescriptions that are based on the desired condition and control objective of each treatment area, the biology of particular invasive plant species, its proximity to water and other sensitive resources, and size of the infestation. Prevention of invasive plant infestations remains a key part of the program and is addressed in the Regional EIS.

Initial treatment estimates include about 2,130 acres of herbicide combined with manual treatment and about 1,700 acres of herbicide treatment combined with manual and mechanical treatment (including 7 acres where controlled burning may also be prescribed).

Treatments may be repeated over several years until suppression, containment, control, and/or eradication objectives are met. Infested areas would be treated with an initial prescription, and retreated in subsequent years, depending on the results. Treatments would be adapted to site conditions that change over time. The proportion of specific treatment methods would be expected to change overtime. Herbicide treatments are part of the initial prescription for most sites; however, use of herbicides would be expected to decline in subsequent entries. Revegetation may also be needed to reduce conditions that are prone to re-infestation. Treatment areas would be monitored to adjust the site-specific prescription and determine whether active revegetation will be needed.

In addition, the Proposed Action would establish a set of project design features for treating future invasive plant infestations. The features are intended to ensure that effects of treating currently unknown plant invasions are within the scope of this EIS decision. Treatment acreage thresholds will be established in 6th field watersheds as needed, based on the severity, intensity and extent of potential adverse effects.

A site-specific, non-significant Forest Plan amendment is also proposed for the Olympic National Forest. Currently, there is a standard in the National Forest Plan that states that herbicide use will be discouraged in riparian areas. However, some invasive plant species (notably knotweed) grow in riparian areas, and herbicides are the most effective and cost-efficient treatment. The Proposed Action would change the standard to allow for riparian treatments with herbicides, as long as all other applicable environmental standards are met.

Maps of the proposed treatment sites are posted on the website mentioned below. Additional information on the proposal are available by contacting Doug Jones.

Previous Scoping

Comments submitted during the scoping conducted for the ''Invasive Plant Treatment Project—Olympic, Gifford Pinchot, and Mt. Hood Nationals Forests and Columbia River Gorge National Scenic Area; Oregon and Washington'' from February 23 to April 5, 2004 will be retained and considered in the development of this EIS. If you have additional comments on the revised proposed action, these will be considered in conjunction with the previous comments. Issues identified from the previous scoping effort are outlined below.

The Forest Service is currently seeking any additional information, comments, and assistance from Federal, State and local agencies, tribes, and other individuals or organizations that may be interested in or affected by this proposed action. Written comments are due September 15. Comments should be specific to the Proposed Action and clearly describe any issues the commenter has with the proposal. Issues will be addressed in the Draft EIS.

In addition to submitting written comments, the public may visit Forest Service officials at any time during the analysis and prior to the decision. A Web site has also been established to disseminate project information: *http://www.fs.fed.us/r6/invasiveplant-eis/multiforest-sitespecific-information.htm.*

Issues Identified From Previous Scoping

The potential for impacts/effects as a result of the establishment and spread of invasive plants and the potential for impacts/effects as a result of treatment actions designed to manage invasive plants are both important considerations that need to be addressed in the analysis. The following issues were identified during the initial scoping process:

- Human Health—Invasive plant treatments may result in health risks to forestry workers and the public, including contamination of drinking water and forest products. Mitigation and protection measures should be evaluated to ensure they protect human health. Public notification measures should be evaluated to ensure that human exposure to herbicide is limited.

• Treatment Effectiveness—Invasive plant treatments can vary in effectiveness. The presence and spread of invasive plants within National Forest System lands may affect the presence and spread of invasive plants on neighboring ownerships. Treatments should be evaluated based on how likely they are to reach desired conditions in the foreseeable future.

• Social and Economic—Invasive plant treatments vary in cost and affect the acreage that can be effectively treated each year given a set budget. Manual treatment methods may cost more per acre, but provide more employment.

• Non-Target Plants and Animals—Impacts to non-target plant and animal species vary by invasive plant treatments. Mitigation and protection measures should be evaluated to ensure they protect plant and animal species (including culturally important plants) from adverse effects.

• Soils, Water Quality and Aquatic Biota—Soil and ground disturbing impacts, effects to aquatic organisms, and water quality impacts vary by invasive plant treatments. Mitigation and protection measures should be evaluated to ensure they protect soil, water quality and aquatic biota from adverse effects.

Alternatives To Be Considered

The No Action alternative will serve as a baseline for comparison of alternatives. Under the No Action alternative, the Olympic National Forest would continue to treat invasive plant species as authorized under existing National Environmental Policy Act (NEPA) documents. The Olympic National Forest would continue to have a standard that discourages herbicide use in riparian areas; however, an existing Environmental Assessment and Decision Notice have authorized herbicide treatments at several knotweed sites in riparian areas.

Additional action alternatives may be developed as the analysis proceeds and if substantive new comments or information is received.

Alternative Evaluation Criteria

The alternatives will be evaluated based on how effectively they treat known sites and respond to new infestations, their monetary cost, and their potential risks to human health and the environment.

Estimated Dates for Draft and Final EIS

Comments received in response to this solicitation, including names and addresses of those who comment, will be considered part of the public record on this proposed action and will be available for public inspection. Comments submitted anonymously will be accepted and considered; however, those who submit anonymous comments may not have standing to appeal the subsequent decision under 36 CFR part 215. Additionally, pursuant to 7 CFR 1.27(d), any person may request the agency to withhold a submission from the public record by showing how the Freedom of Information Act (FOIA) permits such confidentiality. Persons requesting such confidentiality should be aware that, under the FOIA, confidentiality may be granted in only very limited circumstances, such as to protect trade secrets. The Forest Service will inform the requester of the agency's decision regarding the request for confidentiality, and where the request is denied, the agency will return the submission and notify the requester that the comments may be resubmitted with or without name and address within a specified number of days.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of the draft EIS must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC.* 435 U.S. 519, 553 (1978). Also, environmental objectives that could be raised at the draft EIS stage but that are not raised until after the completion of the final EIS may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F. 2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritage, Inc.* v. *Harris,* 490 F. Supp. 1334 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period; so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final EIS.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft EIS should be as specific as possible. It is also helpful if the comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft EIS or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provision of the National Environmental Policy Act (40 CFR 1503.3).

The Draft EIS is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public comment by March 2006. The comment period on the draft EIS will be 45 days from the date the EPA publishes the notice of availability in the **Federal Register**.

Comments on the draft EIS will be analyzed, considered, and responded to by the Forest Service in preparing the final EIS. The final EIS is scheduled to be completed in Summer 2006. The Responsible Official (R.O.) is Dale Hom, Olympic National Forest Supervisor. The R.O. will consider comments, responses, environmental consequences discussed in the final EIS, and applicable laws, regulations, and policies in making a decision regarding this proposed action. The responsible officials will document the decision and rationale for the decision in the Record of Decision. It will be subject to Forest Service Appeal Regulations (36 CFR part 215).

Dated: August 17, 2005.

Virginia Grilley,

Acting Forest Supervisor, Olympic National Forest.

[FR Doc. 05–16897 Filed 8–24–05; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Site-Specific Invasive Plant Treatment Project—Gifford Pinchot National Forest, Washington and Columbia River Gorge National Scenic Area

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The USDA Forest Service will prepare an Environmental Impact Statement (EIS) to document and disclose the potential environmental effects of proposed invasive plant treatments. The Proposed Action is to apply a combination of herbicide, manual and mechanical methods to control known invasive plants within approximately 2,687 acres over 114 treatment areas on the Gifford Pinchot National Forest and Columbia River Gorge National Scenic Area in Washington. The Proposed Action would also establish criteria for responding to infestations that cannot be predicted.

This notice revises the Notice to Intent to prepare an EIS announced in

the **Federal Register** on February 23, 2004. Four national forests were combined for analysis in the 2004 NOI; currently, the Forest Service intends to prepare the three separate site-specific statements: One for the Olympic National Forest, one for the Gifford-Pinchot National Forest and the northern portion of the Columbia River Gorge National Scenic Area in Washington, and one for the Mount Hood National Forest and the southern portion of the Columbia River Gorge National Scenic Area in Oregon. The project has been refined partly in response to comments received during the initial scoping period.

DATES: Comments submitted during the scoping conducted from February 23 to April 5, 2004 will be considered in the development of this EIS. Additional comments on the revised proposed action will be considered in conjunction with the previous comments. Additional comments would be most helpful if received by September 15, 2005.

ADDRESSES: Submit written comments to Doug Jones, Mt. Hood National Forest, 6780 Hwy 35, Mt. Hood, OR 97041. Electronic comments can be submitted to *comments-pacificnorthwest-mthood-hoodriver@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Doug Jones, 541.352.6002 or *dgjones@fs.fed.us.*

SUPPLEMENTARY INFORMATION:

Need for the Proposal

Invasive plants are compromising the ability for the Forest Service to manage for healthy native ecosystems. Invasive plants create a host of environmental and other effects, most of which are harmful to native ecosystem processes, including: displacement of native plants; reduction in functionality of habitat and forage for wildlife and livestock; loss of threatened, endangered, and sensitive species; increased soil erosion and reduced water quality; alteration of physical and biological properties of soil, including reduced soil productivity; changes to the intensity and frequency of fires; high cost (dollars spent) of controlling invasive plants; and loss of recreational opportunities.

Approximately 2,687 acres on the Giffod Pinchot National Forest and northern portion of the Columbia River Gorge National Scenic Area are infested with invasive, non-native plants. These infestations have a high potential to expand and further degrade the National Forest and other lands. Infested areas represent potential seed sources for further invasion onto neighboring ownerships.

There is an underlying need for timely suppression, containment, control, and/or eradication of invasive plants on these national forest system lands so that desired environmental and social conditions may be achieved (these terms are based on the R6 FEIS: *Eradication:* Elimination of an invasive plant species from an area. *Control:* Infestation size reduced over time; some level of infestation may be acceptable. *Containment:* Spread of the weed prevented beyond the perimeter of patches or infestation areas mapped from current inventories. *Suppression:* Invasive plant seed production prevented throughout the target patch; invasive species does not dominate the vegetation of the area; low levels may be acceptable). Without action, invasive plant populations will continue to have adverse effects on national forest system and adjacent lands.

Proposed Action

The Proposed Action for this project is to apply site-specific treatment prescriptions that are based on the desired condition and control objective of each treatment area, the biology of particular invasive plants species, its proximity to water and other sensitive resources, and size of the infestation (these factors may change over time).

Initial treatment estimates include about 2,375 acres of herbicide combined with manual treatment and about 175 acres of herbicide treatment combined with manual and mechanical treatment. One site on the Columbia River Gorge National Scenic Area would be grazed with goats as parts of the treatment prescription. The Scenic Area also has 137 acres that would be treated with a combination of herbicide and mechanical means.

Treatments may be repeated over several years until suppression, containment, control, and/or eradication objectives are met. Infested areas would be treated with an initial prescription, and retreated in subsequent years, depending on the results. Treatments types as well as the proportion of specific treatment methods would be expected to change over time. Herbicide treatments are part of the initial prescription for most sites, however, use of herbicides would be expected to decline in subsequent entries. Revegetation may also be needed to reduce conditions that are prone to re-infestation. Treatment areas would be monitored to adjust the site-specific prescription and determine whether active revegetation will be needed.

In addition, the Proposed Action would establish a set of criteria for treating future invasive plant infestations. The criteria are intended to ensure that effects of treating currently unknown plant invasions are within the scope of this EIS decision.

A site-specific, non-significant Forest Plan amendment is also being considered for the Gifford Pinchot National Forest. Currently, there is a standard in the Gifford-Pinchot National Forest Plan that severely restricts herbicide use in riparian areas. However, some invasive plant species (notably knotweed) grow in riparian areas and herbicides may be the most cost-effective treatment. The Proposed Action would change the standard to allow for riparian treatments with herbicides, as long as all other applicable environmental standards are met.

Maps of the proposed treatments sites and additional information on the proposal are available by contacting Doug Jones.

Previous Scoping

Comments submitted during the scoping conducted for the ''Invasive Plant Treatment Project—Olympic, Gifford Pinchot, and Mt. Hood Nationals Forests and Columbia River Gorge National Science Area; Oregon and Washington'' from February 23 to April 5, 2004 will be retained and considered in the development of this EIS. If you have additional comments on the revised proposed action these will be considered in conjunction with the previous comments. Issues identified from the previous scoping effort are outlined below.

The Forest Service is currently seeking any additional information, comments, and assistance from Federal, State and local agencies, tribes, and other individuals or organizations that may be interested in or affected by the proposed action. Written comments are due September 15. Comments should be specific to the Proposed Action and clearly describe any issues the commenter has with the proposal. Issues will be addressed in the Draft EIS.

In addition to submitting written comments, the public may visit Forest Service officials at any time during the analysis and prior to the decision. A Web site has also been established to disseminate project information: *http://www.fs.fed.us/r6/invasiveplant-eis/multiforest-sitespecific-information.htm.*

Issues Identified From Previous Scoping

The potential for impacts/effects as a result of the establishment and spread of invasive plants and the potential for impacts/effects as a result of treatment actions designed to manage invasive plants are both important considerations that need to be addressed in the analysis. The following issues were identified during the initial scoping process:

- Human Health—Invasive plant treatments may result in health risks to forestry workers and the public, including contamination of drinking water and forest products. Mitigation and protection measures should be evaluated to ensure they protect human health. Public notification measures should be evaluated to ensure that human exposure to herbicide is limited.
- Treatment Effectiveness—Invasive plant treatments can vary in effectiveness. The presence and spread of invasive plants within National Forest System lands may be affect the presence and spread of invasive plants on neighboring ownerships. Treatments should be evaluated based on how likely they are to reach desired conditions in the foreseeable future.
- Social and Economic—Invasive plant treatments vary in cost and affect the acreage that can be effectively treated each year given a set budget. Manual treatment methods may cost more per acre and provide more employment.
- Non-Target Plants and Animals—Impacts to non-target plant and animal species varies by invasive plant treatments. Mitigation and protection measures should be evaluated to ensure they protect plant and animal species (including culturally important plants) from adverse effects.
- Soils, Water Quality and Aquatic Biota—Soil and ground disturbing impacts, effects to aquatic organisms, and water quality impacts vary by invasive plant treatments. Mitigation and protection measures should be evaluated to ensure they protect soil, water quality and aquatic biota from adverse effects.

Alternatives Considered

The No Action alternative will serve as a baseline for comparison of alternatives. Under the No Action alternative, the Gifford-Pinchot National Forest/Columbia River Gorge National Scenic Area would continue to treat invasive plant species as authorized under existing National Environmental Policy Act (NEPA) documents. The Gifford-Pinchot National Forest would continue to have a standard that severely restricts herbicide use in riparian areas.

Alternative Evaluation Criteria

The alternatives will be evaluated based on how effectively they treat known and respond to new infestations, their monetary cost, and their potential risks to human health and the environment.

Estimated Dates for Draft and Final EIS

The Draft EIS is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public comment by March 2006. The comment period on the draft EIS will be 45 days from the date the EPA publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of the draft EIS must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC.* 435 U.S. 519.553 (1978). Also, environmental objectives that could be raised at the draft EIS stage but that are not raised until after the completion of the final EIS may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F. 2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritage, Inc.* v. *Harris,* 490 F. Supp. 1334 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period; so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final EIS.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft EIS should be as specific as possible. It is also helpful if the comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft EIS or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provision of the National Environmental Policy Act (40 CFR 1503.3).

Comments received in response to this solicitation, including names and addresses of those who comment, will be considered part of the public record on this proposed action and will be available for public inspection. Comments submitted anonymously will be accepted and considered; however, those who submit anonymous comments may not have standing to appeal the subsequent decision under 36 CFR part 215. Additionally, pursuant to 7 CFR 1.27(d), any person may request the agency to withhold a submission from the public record by showing how the Freedom of Information Act (FOIA) permits such confidentiality. Persons requesting such confidentiality should be aware that, under the FOIA, confidentiality may be granted in only very limited circumstances, such as to protect trade secrets. The Forest Service will inform the requester of the agency's decision regarding the request for confidentiality, and where the request is denied, the agency will return the submission and notify the requester that the comments may be resubmitted with or without name and address within a specified number of days.

Comments on the draft EIS will be analyzed, considered, and responded to by the Forest Service in preparing the final EIS. The Final EIS is scheduled to be completed in 2006. The Responsible Officials are Claire Lavendel, Gifford Pinchot National Forest Supervisor and Daniel T. Harkenrider, Columbia River Gorge National Scenic Area Manager. These officials will consider comments, responses, environmental consequences discussed in the final EIS, and applicable laws, regulations, and policies in making a decision regarding this proposed action. The responsible officials will document the decision and rationale for the decision in the Record of Decision. It will be subject to Forest Service Appeal Regulations (36 CFR Part 215).

Dated: August 16, 2005.

Claire Lavendel,

Forest Supervisor, Gifford Pinchot National Forest.

Dated: August 12, 2005.

Daniel T. Harkenrider,

Area Manager, Columbia River Gorge National Scenic Area.

[FR Doc. 05–16901 Filed 8–24–05; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Plumas National Forest; Beckwourth Ranger District, California; Freeman Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an Environmental Impact Statement.

SUMMARY: The USDA Forest Service, Plumas National Forest will prepare an Environmental Impact Statement (EIS) to reduce hazardous fuels, improve forest health, improve bald eagle habitat, cost effectively support the local communities, improve aspen stands, provide access needed to meet other project objectives and reduce transportation system impacts on the west side of Lake Davis near Portola, CA.

DATES: Although comments will be accepted throughout any phase of this project, it would be most helpful if comments on the scope of the analysis were received within 30 days of the date of publication of this notice of intent in the **Federal Register**. The draft EIS is expected in April 2006 and the final EIS is expected in August 2006.

ADDRESSES: Send written comments to Robert Mac Whorter, Plumas National Forest, PO Box 11500, Quincy, CA 95971; fax: (530) 283–7746. Comments may be: (1) Mailed to the Responsible Official; (2) hand-delivered between the hours of 8 a.m.–4:30 p.m. weekdays Pacific time; (3) faxed to (530) 283–7746; or (4) electronically mailed to: *comments-pacificsouthwest-plumas@fs.fed.us.* Comments submitted electronically must be in Rich Text Format (.rtf).

FOR FURTHER INFORMATION CONTACT: Sabrina Stadler, Interdisciplinary Team Leader, Plumas National Forest, Beckwourth Ranger District, P.O. Box 7, Blairsden, CA 96103, (530) 836–2575.

SUPPLEMENTARY INFORMATION:

Project Location

The project area is located north of Portola and west of Lake Davis, in the Beckwourth Ranger District of the Plumas National Forest. It is within all or parts of T23N, R12E; T23N, R13E; T24N, R12E; T24N, R13E.

Purpose and Need for Action

The effects of several vegetation management projects will be analyzed in this EIS. The need for and purpose of the project has six elements: to reduce hazardous fuels in the wildland/urban interface (WUI) and to create a strategic network of linear fuel treatments across the landscape referred to as defensible fuel profile zones (DFPZs); to improve forest health; to improve bald eagle habitat; to implement the project in a cost effective manner and contribute to local community economic stability; to improve aspen stands; to provide the access needed to meet other project objectives and reduce transportation system impacts.

In its effort to reduce excessive fuel, the Forest Service intends to work with the Plumas County Fire Safe Council to reduce hazardous fuels around local communities, as well as to develop a strategic network of linear fuel treatments across the landscape. This will reduce the potential for large-scale, high-intensity fire where wildfire behavior would be modified to allow for safer, more effective fire suppression.

Many stands in the project are infected with small pockets of insects and disease. The insects include both bark beetles (*Dendroctonus brevicomus, D. valens*) and pine engravers (*Ips* spp.). The diseases include mistletoe (*Arceuthobium* spp.), white pine blister rust (*Cronartium ribicola*) and annosus root rot (*Heterobasidion annosum*).

Stands in the Lake Davis Bald Eagle Habitat Management Area (BEHMA) in the Freeman project area are overstocked, largely unable to recruit nesting structure, and at risk of loss from wildlife and disease/insect infestation.

In addition to reducing the risk of catastrophic wildfire and improving forest health, this project would provide products that contribute to community stability in the most cost-effective manner possible, considering other resource objectives, by creating employment and income that contribute to local economic activity.

Aspen stands in the project area are low in productivity and health, and most are not successfully regenerating. Field evaluation indicates that, regardless of the relative contribution of these various factors, at present, competition by conifers is a major factor in aspen decline. Aspen stand improvement work will maintain or improve diverse and productive native plant communities in the riparian zone, as well as to support populations of well-distributed native plant, vertebrate and invertebrate populations that contribute to the viability of riparian plant communities.

The proposed road relocation and decommissioning work is needed to achieve desired riparian conditions and to reduce the total area of compacted soil.

Proposed Action

The project area consists of 14,967 acres of the PNF managed by the Beckwourth Ranger District. The proposed action will treat 5,792 acres, approximately 39 percent of the project area by: reducing hazardous fuels; improving forest health, improving bald eagle habitat, cost effectively supporting the local communities; improving aspen stands; and providing the access needed to meet other project objectives and reducing transportation system impacts.

Fuel reduction treatments will occur over 3,066 acres of the DFPZ and WUI. Treatments are specifically designed to cause advancing wildfire to drop to the ground and burn with reduced intensity and will involve several methods (i.e., grapple pile, handthin, mastication, mechanical thinning, underburn only).

Forest health improvement will involve the use of group selection to remove insect and disease infected pockets within the stands. Group selection will be on 175 acres, ranging from 0.5–2 acres in size. The health of plantations and young conifer stands will also be addressed, through area thinning, mastication and grapple piling.

Over half of the eagle habitat within the project area would receive some kind of treatment, consisting of mechanical thinning, hand thinning, underburn only, group selection and mechanical aspen treatments, covering 1,964 acres. Treatments would focus on removing diseased pockets of trees and increasing the quantity of nesting habitat by thinning stands to accelerate growth.

Aspen stands would be treated to remove conifers to enhance aspen health and growth. Aspen would be released from conifer competition in 40 units totaling approximately 645 acres, ranging in size between 1–85 acres. Conifers to be removed are within the existing aspen stand (i.e., those trees actively suppressing aspen community productivity and function) or trees bordering a stand, which directly affect the health of the stand. All conifers up to 29.9″ dbh would also be removed within a variable-width treatment zone extending up to 150′ beyond the outer boundary of the aspen stands.

The Forest proposes to improve transportation system needed to access the vegetation/fuels treatment units and to mitigate existing adverse effects on heritage resources, soils, and water quality. These improvements to the transportation system will include: building approximately 17 short segments of temporary roads (decommissioned upon completion), totaling 2-miles, needed to implement planned activities; decommissioning approximately 12.5-miles of existing system roads and 1.9-miles of non-system roads; closing 0.7-miles of system roads; relocating 0.2-mile of system road and 0.7-mile of system road would be reduced to single-track, in order to provide for recreational opportunities near Lake Davis.

Hazard trees would be removed from along Maintenance Level 3, 4 and 5 roads (generally, surfaced roads) and high-use Maintenance Level 2 roads (generally native-surface roads). Identification of hazard trees would follow guidelines in the Plumas National Forest Roadside/Facility Hazard Tree Abatement Action Plan (2003).

Lead Agency: The USDA Forest Service is the lead agency for this proposal.

Responsible Official: Plumas National Acting Forest Supervisor, Robert G. MacWhorter is the responsible official; Plumas National Forest, P.O. Box 11500, Quincy, CA 95971.

Nature of Decision To Be Made

The responsible official will decide whether to implement this project as proposed, implement the project based on an alternative to this proposal that is formulated to resolve identified issues or not implement this project at this time. The responsible official will be the Plumas National Forest Forest Supervisor.

Scoping Process

Public questions and comments regarding this proposal are an integral part of this environmental analysis process. Comments will be used to identify issues and disqualification alternatives to the proposed action. To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments should be as specific as possible.

A copy of the proposed action and/or a summary of the proposed action will be mailed to adjacent landowners, as well as to those people and organizations that have indicated a specific interest in the Freeman project, to Native American entities, and Federal, State and local agencies. The public will be notified of any meetings regarding this proposed by mailings and press releases sent to the local newspaper and media. There are no meetings planned at this time.

Permits or Licenses Required: An Air Pollution Permit and a Smoke Management Plan are required by local agencies.

Comment

This notice of intent initiates the scoping process which guides the development of the EIS. Our desire is to receive substantive comments on the merits of the proposed action, as well as comments that address errors, misinformation, or information that has been omitted. Substantive comments are defined as comments within the scope of the proposal, that have a direct relationship to the proposal, and that include supporting reasons for the responsible official's consideration.

Early Notice of Importance of Public Participation in Subsequent Environmental Review: A draft environmental impact statement will be prepared for comment. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised as the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21)

Dated: August 19, 2005.

Kathleen L. Gay,

Acting Forest Supervisor.

[FR Doc. 05–16898 Filed 8–24–05; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Producing Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration (EDA), Commerce.

ACTION: To give all interested parties an opportunity to comment.

Petitions have been accepted for filing on the dates indicated from the firms listed below.

LIST OF PETITION ACTION BY TRADE ADJUSTMENT ASSISTANCE FOR PERIOD JULY 16, 2005–AUGUST 19, 2005

Firm name	Address	Date petition accepted	Product
Source Code Corporation	290 Vanderbilt Avenue Norwood, MA 02062.	10–Aug–05	Computers and servers.
ITA Corporation	2401 Research Boulevard Rockville, MD 20850.	25–Jul–05	Accounting and human resource software.

LIST OF PETITION ACTION BY TRADE ADJUSTMENT ASSISTANCE FOR PERIOD JULY 16, 2005–AUGUST 19, 2005—Continued

Firm name	Address	Date petition accepted	Product
Rolco, Inc	946 East Hill Street Kasota, MN 56050.	29–Jul–05	Injection mold plastic components for general industrial, table games, medical equipment, electronics and automobiles.
Harden Furniture, Inc	8550 Mill Pond Way McConnellsville, NY 13401.	22–Jul–05	Hardwood end tables, entertainment centers, dining room tables and chairs, and beds and bedroom furniture.
Criterion Technology, Inc	101 McIntosh Parkway Thomaston, GA 30286.	22–Jul–05	Thermoformed or injection-molded acrylic and polycarbonate enclosures/castings, used primarily to protect security cameras.
Garmat USA, Inc	1401 West Standord Avenue Englewood, CO 80110.	26–Jul–05	Enclosure systems for process control in automotive applications.
Whirley Industries, Inc	618 Fourth Avenue Warren, PA 16365.	26–Jul–05	Plastic cups.
Trapper Peak Forge, Inc. d.b.a. Hacienda Iron Craft.	4072 Eastside Highway Stevensville, MT 59870.	29–Jul–05	Ornamental iron work.
Quality Metal Products, Inc	11500 West 13th Avenue Lakewood, CO 80215.	29–Jul–05	Counters, lockers, racks, display cases, shelves, partitions and similar fixtures of metal.
Sashco, Inc	10300 East 107th Place Brighton, CO 80601.	10–Aug–05	Acrylic polymer.
Marlin Firearms Company (The).	100 Kenna Drive North Haven, CT 06473.	16–Aug–05	Shotguns and rifles.
RMO, Inc	650 West Colfax Avenue Denver, CO 80204.	11–Aug–05	Non plastic dental fittings.
KALD Tool and Die Corporation.	3022 Highway 145 Richfield, WI 53076.	11–Aug–05	Molds for plastic injection molding and metal die casting.

The petitions were submitted pursuant to section 251 of the Trade Act of 1974 (19 U.S.C. 2341). Consequently, the United States Department of Commerce has initiated separate investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each firm contributed importantly to total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm. Any party having a substantial interest in the proceedings may request a public hearing on the matter. A request for a hearing must be received by Trade Adjustment Assistance, Room 7812, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than the close of business of the tenth calendar day following the publication of this notice. The Catalog of Federal Domestic Assistance official program number and title of the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance.

Dated: August 19, 2005.

Anthony J. Meyer,

Senior Program Analyst, Office of Strategic Initiatives.

[FR Doc. 05–16892 Filed 8–24–05; 8:45 am]

BILLING CODE 3510–24–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 04–BIS–14]

Action Affecting Export Privileges; Sunford Trading, Ltd.; In the Matter of: Sunford Trading Ltd., Room 2208, 22/F, 118 Connaught Road West, Hong Kong, China, Respondent; Order Relating to Sunford Trading, Ltd.

The Bureau of Industry and Security, U.S. Department of Commerce (''BIS'') has initiated an administrative proceeding against Sunford Trading, Ltd. (''Sunford'') pursuant to Section 766.3 of the Export Administration Regulations (currently codified at 15 CFR parts 730–774 (2005)) (''Regulations''),[1] and Section 13(c) of the Export Administration Act of 1979, as amended (50 U.S.C. app. 2401–2420 (2000)) (''Act''),[2] through issuance of a charging letter to Sunford that alleged that Sunford committed three violations of the Regulations. Specifically, the charges are:

1. *One violation of 15 CFR 764.2(e)—Ordering, Buying, Financing, and/or Forwarding Items to China With the Knowledge That a Violation of the Regulations Will Occur.* Beginning on or about November 23, 1998 and continuing to on or about July 20, 1999, Sunford ordered, bought, financed, and/or forwarded an industrial hot press furnace to the Beijing Research Institute of Materials and Technology (hereinafter, ''BRIMT'') in China with knowledge that a violation of the Regulations would occur. Specifically, at the time Sunford ordered, bought, financed, and/or forwarded the furnace, it knew or had reason to know that a Department of Commerce license was required for export to BRIMT under Section 744.3 of the Regulations, and that such license would not be obtained.

2. *One violation of 15 CFR 764.2(d)—Conspiring To Export an Industrial Furnace to China Without the Required U.S. Government Authorization.* Beginning on or about November 23, 1998 and continuing to on or about July 20, 1999, Sunford conspired or acted in concert with others, known and

[1] The violations charged occurred during 1999. The Regulations governing the violations at issue are found in the 1999 version of the Code of Federal Regulations (15 CFR parts 730–774 (1999)). The 2005 Regulations establish the procedures that apply to this matter.

[2] From August 21, 1994 through November 12, 2000, the Act was in lapse. During that period, the President, through Executive Order 12924, which had been extended by successive Presidential Notices, the last of which was August 3, 2000 (3 CFR, 2000 Comp. 397 (2001)), continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706 (2000)) (''IEEPA''). On November 13, 2000, the Act was reauthorized and it remained in effect through August 20, 2001. Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), as extended by the Notice of August 6, 2004 (69 FR 48763, August 10, 2004), has continued the Regulations in effect under the IEEPA.

unknown, to bring about acts that constituted a violation of the Regulations when it agreed to participate in the export of the furnace referenced above to BRIMT in China without the Department of Commerce license required by Section 744.3 of the Regulations. In furtherance of the conspiracy, Sunford and its co-conspirators agreed to conceal the identity of the actual end-user and of the item being exported in an attempt to circumvent the license requirement described in Section 744.3 of the Regulations.

3. *One violation of 15 CFR 764.2(b)—Causing an Export to China Without the Required Department of Commerce License.* Beginning on or about November 23, 1998 and continuing to on or about July 20, 1999, Sunford caused the export of the furnace described above to BRIMT in China without the required Department of Commerce license. Specifically, Sunford ordered, bought, financed, and/or forwarded the industrial furnace described above, thereby causing the furnace to be exported to BRIMT in China despite the fact that the Department of Commerce license required by Section 744.3 of the Regulations had not been obtained.

Whereas, BIS and Sunford have entered into a Settlement Agreement pursuant to Section 766.18(b) of the Regulations whereby they agreed to settle this matter in accordance with the terms and conditions set forth therein, and

Whereas I have approved of the terms of such Settlement Agreement;

It is therefore ordered:

First, that a civil penalty of $33,000 is assessed against Sunford, which shall be paid to the U.S. Department of Commerce within 30 days from the date of entry of this Order. Payment shall be made in the manner specified in the attached instructions.

Second, that, pursuant to the Debt Collection Act of 1982, as amended (31 U.S.C. 3701–3720E (2000)), the civil penalty owed under this Order accrues interest as more fully described in the attached Notice, and, if payment is not made by the due date specified herein, Sunford will be assessed, in addition to the full amount of the civil penalty and interest, a penalty charge and an administrative charge, as more fully described in the attached Notice.

Third, that the timely payment of the civil penalty set forth above is hereby made a condition to the granting, restoration, or continuing validity of any export license, license exception, permission, or privilege granted, or to be granted, to Sunford, Accordingly, if Sunford should fail to pay the civil penalty in a timely manner, the undersigned may enter an Order denying all of Sunford's export privileges for a period of one year from the date of entry of this Order.

Fourth, for a period of three years from the date of entry of the Order, Sunford Trading, Ltd., Room 2208, 22/F, 118 Connaught Road West, Hong Kong, China, its successors or assigns, and when acting for or on behalf of Sunford, its officers, representatives, agents, or employees (''Denied Person'') may not participate, directly or indirectly, in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

Fifth, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Sixth, that, to prevent evasion of this Order, BIS, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, may make any person, firm, corporation, or business organization related to Sunford by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services subject to the provisions of this Order.

Seventh, that this Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology.

Eighth, that the charging letter, the Settlement Agreement, this Order, and the record of this case as defined by Section 766.20 of the Regulations shall be made available to the public.

Ninth, that the administrative law judge shall be notified that this case is withdrawn from adjudication.

This Order, which constitutes the final agency action in this matter, is effective upon publication in the **Federal Register**.

Entered this 18th day of August 2005.

Wendy Wysong,

Acting Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 05–16885 Filed 8–24–05; 8:45 am]

BILLING CODE 3510–DT–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 081905B]

Notice of Intent to Conduct Public Scoping Meetings and to Prepare an Environmental Impact Statement Related to the Makah Tribe's Continuation of Treaty Right Hunting of Gray Whales

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; scoping meetings.

SUMMARY: We intend to conduct public scoping meetings to gather information to prepare an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA), related to the Makah Tribe's request that NMFS waive the take moratorium of the Marine Mammal Protection Act (MMPA) to allow for treaty right hunting of eastern North Pacific gray whales in usual and accustomed grounds off the coast of Washington State. This notice briefly describes the background of the Makah's request for waiver; gives dates, times, and locations of public scoping meetings; identifies a set of preliminary alternatives to serve as a starting point for discussions; and terminates the prior notice of intent to prepare an EIS on a similar action.

DATES: Three public scoping meetings are scheduled:

1. October 5, 2005, Neah Bay, WA.
2. October 6, 2005, Port Angeles, WA.
3. October 11, 2005, Seattle, WA.

See **SUPPLEMENTARY INFORMATION** for specific times and locations of the public meetings.

In addition to the meetings, written or electronic comments from all interested parties are encouraged and must be received no later than 5 p.m. PDT October 24, 2005.

ADDRESSES: All comments concerning preparation of the EIS and NEPA process should be addressed to: Kassandra Brown, NMFS Northwest Region, Building 1, 7600 Sand Point Way NE, Seattle, WA 98115. Comments may also be submitted via fax (206)526-6426, Attn: Makah Tribe Whale Hunt EIS, or by electronic mail to *MakahEIS.nwr@noaa.gov* with a subject line containing the document identifier: Makah Whale EIS.

FOR FURTHER INFORMATION CONTACT: Kassandra Brown, NMFS Northwest Region, (206)526–4348.

SUPPLEMENTARY INFORMATION:

Public Scoping Meetings

Specific Times and Locations

Public scoping meetings will be held at the following addresses and times:

1. October 5, 2005, 6:30 p.m. – 9:30 p.m., Makah Tribal Council Community Hall, 81 3rd Avenue (Makah Passage), Neah Bay, WA.

2. October 6, 2005, 6:30 p.m. – 9:30 p.m., Vern Burton Memorial Community Center, 308 East 4th Street (corner of 4th Street and Peabody Street), Port Angeles, WA.

3. October 11, 2005, 6:30 p.m. – 10 p.m., South Lake Union Park, 860 Terry Avenue North (The Naval Reserve Building), Seattle, WA.

The meeting format has been designed so that the public can constructively assist NMFS in development of the draft EIS, and will generally include presentations and small group work sessions. More details regarding meeting format will be posted under the ''gray whale'' link at *http://www.nwr.noaa.gov* by mid-September 2005.

Reasonable Accommodation

Persons needing reasonable accommodations to attend and participate in the public meetings should contact Kassandra Brown (see **FOR FURTHER INFORMATION CONTACT**). To allow sufficient time to process requests, please call at least 10 business days prior to the relevant meeting(s). Information regarding the Makah's request is available in alternative formats upon request.

Background

The Makah Indian Tribe of Washington State (Makah) seeks to continue its subsistence hunt(s) of eastern North Pacific (ENP) gray whales, a tradition dating back at least 1,500 years. The Makah's right to hunt whales at usual and accustomed grounds and stations off the coast of Washington was secured in Article 4 of the 1855 Treaty of Neah Bay in exchange for most of the land in the Olympic Peninsula. The Treaty of Neah Bay is the primary instrument defining the legal relationship between the United States Government and the Makah.

The Makah hunted whales until the 1920s when commercial whaling had drastically reduced the numbers of ENP gray whales available to the Makah hunters for harvest. Prior to enactment of the Endangered Species Act (of 1973 16 U.S.C. 1351 *et seq.*), the U.S. Fish and Wildlife Service included gray whales (among several genera of baleen whales) on its 1970 list of endangered species (35 FR 8491, June 2, 1970). The ENP distinct population segment was subsequently delisted on June 16, 1994 (59 FR 31094). In 1999, Makah hunters killed one ENP gray whale pursuant to an aboriginal subsistence harvest quota granted for 1998 through 2002 by the International Whaling Commission (IWC) and domestically implemented by NMFS under the Whaling Convention Act (WCA)(16 U.S.C. 916 *et seq.*). Due to a series of lawsuits, no whales were hunted by the Makah for the remainder of the 1998 through 2002 quota.

In May 2002, the IWC approved another aboriginal subsistence harvest quota of 620 gray whales for 2003 through 2007, on the basis of a joint request by the Russian Federation (approved for 600 whales) and the United States (approved for 20 whales). The United States' request was made on behalf of the Makah. On March 6, 2003 NMFS initiated an EIS to assess the environmental impacts of allocating the 2003 through 2007 quota to the Makah by soliciting comments and information to facilitate the environmental analysis (68 FR 10703). Due to litigation (described below), NMFS did not complete the EIS and did not allocate the quota under the WCA. The Makah have not conducted subsistence hunts to date under the 2003 through 2007 IWC quota.

On June 7, 2004, the Ninth Circuit Court of Appeals in the second amended version of *Anderson* v. *Evans*, 371 F.3d 475, held that the Tribe, to pursue any treaty rights for whaling, must comply with the process prescribed in the MMPA (16 U.S.C. 1361 *et seq.*) for authorizing ''take'' of marine mammals otherwise prohibited by a moratorium in section 101(a)(16 U.S.C. 1371(a)). The term ≥take≥ means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal (16 U.S.C. 1362(13)). Subsequent to the *Anderson* v. Evans ruling, the Makah submitted a request for a limited waiver of the moratorium on taking marine mammals, which we received on February 14, 2005. We published notice of availability of the waiver request for public inspection on March 3, 2005 (70 FR 10369), available online at *http://www.nmfs.noaa.gov/pr/international/makah* (soon to be available on the NMFS Northwest Region website under the ''gray whale'' link at *http://www.nwr.noaa.gov*).

To exercise subsistence hunting treaty rights of gray whales, the Makah Tribe must undergo three separate but related processes: (1) The United States must obtain an aboriginal subsistence quota from the IWC on the Makah Tribe's behalf, (2) NMFS must decide whether to waive the MMPA take moratorium for the Makah Tribe, including conducting a NEPA review and issuing possible regulations and permits (see Proposed Action for more details), and (3) NMFS must allocate the IWC quota under the WCA. More information regarding these processes will soon be available to the public under the NMFS Northwest Region website ''gray whale'' link at *http://www.nwr.noaa.gov*. The NEPA review initiated by this notice of intent is to comply with process number (2) described above, which requires preparation of a site-specific EIS related

to the Makah Tribe's request for a waiver of the MMPA take moratorium.

Proposed Action

The Makah's proposed action is to hunt up to 20 ENP gray whales during a 5-year period, subject to a maximum of five gray whales in any calendar year, within its adjudicated usual and accustomed grounds (See, *United States* v. *Washington*, 626 F.Supp. 1405, 1467 (W.D. Wash 1985)), subject to quotas granted by the IWC. The Makah proposes to hunt up to seven gray whales per year. The Makah's proposal to continue subsistence hunting of gray whales includes other standards for hunting, such as: (1) time and area restrictions designed to avoid any intentional harvest of gray whales comprising the Pacific Coast Feeding Aggregation (PCFA), (2) monitoring and adaptive management measures to ensure that any incidental harvest of gray whales from the PCFA remains at or below the annual strike limit, (3) measures to ensure that hunting is conducted in the most humane manner practicable, consistent with continued use of traditional hunting methods, and (4) measures to protect public safety. The full waiver request is posted online at *http://www.nmfs.noaa.gov/pr/international/makah*, and will soon be available at NMFS Northwest Region's website at *http://www.nwr.noaa.gov* under the ''gray whale'' link.

Based on the Makah's waiver request, the Federal action consists of three parts: (1) Waiving the moratorium on take of marine mammals under section 101(a)(3)(A)(16 U.S.C. 1371(3)(A)) of the MMPA, and subsequently (2) promulgating hunting regulations implementing the waiver in accordance with section 103 (16 U.S.C. 1373) of the MMPA, and (3) issuing any necessary permit(s) to the Makah for whale hunting.

If NMFS waives the MMPA take moratorium and issues the necessary regulations and permit(s), the Makah would be allowed to continue subsistence hunting of ENP gray whales, subject to IWC quotas and allocation of those quotas under the WCA. The NEPA review initiated by this notice of intent, therefore, involves preparation of a site-specific EIS related to the Makah Tribe's proposed action of continuing treaty right subsistence ENP whale hunting (i.e., request for a waiver of the MMPA take moratorium), and alternatives to the waiver request.

Alternatives

Pursuant to NEPA, which requires Federal agencies to conduct an environmental analysis of proposed actions to determine if the actions may affect the human environment, and in recognition of the Ninth Circuit Court of Appeals ruling in Anderson v. Evans, we intend to conduct public scoping meetings and to prepare an EIS. Under NEPA, a reasonable range of alternatives to a proposed action must be developed and considered in our environmental review. Alternatives considered for analysis in this EIS may include: variations in the scope of the hunting activities, variations in the hunting location, or a combination of these elements. In addition, the EIS will identify potentially significant direct, indirect, and cumulative impacts on geology and soils, air quality, water quality, other fish and wildlife species and their habitat, vegetation, socioeconomics/tourism, treaty rights and Federal trust responsibilities, environmental justice, cultural resources, noise, aesthetics, transportation, public services, and human health and safety, and other environmental issues that could occur with the implementation of the Makah's proposed action and alternatives. For all potentially significant impacts, the EIS will identify avoidance, minimization, and mitigation measures to reduce these impacts, where feasible, to a level below significance.

We have identified the following preliminary alternatives for public comment during the public scoping period, and encourage information on additional alternatives to consider:

Alternative 1: No Action - Under the No Action Alternative, we would not approve the requested whale hunting, would not grant the waiver of the moratorium on take under the MMPA, nor issue the necessary regulations and permits.

Alternative 2: The Proposed Action - Under the proposed action, the Makah Tribe would be allowed to continue treaty right subsistence hunting of gray whales imposing time and area restrictions designed to target migrating whales and to avoid any intentional harvest of whales from the PCFA. We would grant the waiver of the moratorium on take under the MMPA and issue the necessary regulations and permits.

Alternative 3: The proposed action would be modified to allow limited take of gray whales from the PCFA during hunts.

Alternative 4: The proposed action would be modified to remove time and area restrictions from the hunts.

Alternative 5: The proposed action would be modified to allow hunting to target migrating whales, imposing time and area restrictions different than those contained in the proposed action that would maximize the likelihood of taking a migrating whale (and minimize the likelihood of taking a PCFA whale).

Request for Comments

We provide this notice to: (1) Advise other agencies and the public of our intentions, (2) obtain suggestions and information on the scope of issues to include in the EIS, (3) terminate the prior notice of intent to prepare an EIS on allocation of the 2003 through 2007 quota (68 FR 10703) published on March 6, 2003. Comments and suggestions received during the prior public comment period for the 2003 through 2007 quota allocation (March 6 through April 21, 2003), will be considered in developing the current EIS. Other comments and suggestions are invited from all interested parties to ensure that the full range of issues related to the Makah's waiver request and all significant issues are identified. We request that comments be as specific as possible. We seek public input on the scope of the required NEPA analysis, including the range of reasonable alternatives; associated impacts of any alternatives on the human environment, including geology and soils, air quality, water quality, other fish and wildlife species and their habitat, vegetation, socioeconomics/tourism, treaty rights and Federal trust responsibilities, environmental justice, cultural resources, noise, aesthetics, transportation, public services, and human health and safety; and suitable mitigation measures.

Comments concerning this environmental review process should be directed to NMFS (see **ADDRESSES**). See **FOR FURTHER INFORMATION CONTACT** for questions. All comments and material received, including names and addresses, will become part of the administrative record and may be released to the public.

Authority

The environmental review of continuation of the Makah subsistence gray whale hunting will be conducted under the authority and in accordance with the requirements of NEPA, Council on Environmental Quality Regulations (40 CFR 1500-1508), other applicable Federal laws and regulations, and policies and procedures of NMFS for compliance with those regulations. This notice is being furnished in accordance with 40 CFR 1501.7 to obtain suggestions and information from other agencies and the public on the scope of issues and alternatives to be addressed in the EIS.

Dated: August 19, 2005.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 05–16940 Filed 8–24–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 080405A]

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of two Letters of Authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, and implementing regulations, notification is hereby given that NMFS has issued two 1–year Letters of Authorization (LOAs) to take marine mammals by harassment incidental to the U.S. Navy's operation of Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA) sonar operations to the Chief of Naval Operations, Department of the Navy, 2000 Navy Pentagon, Washington, D.C., and persons operating under his authority.

DATES: Effective from August 16, 2005, through August 15, 2006.

ADDRESSES: Copies of the LOAs and the Navy's March 31, 2005 application, which contains a list of references used in this document, are available by writing to Steve Leathery, Chief, Permits, Conservation, and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225, by telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**), or online at: *http://www.nmfs.noaa.gov/prot_res/PR2/Small_Take/smalltake_info.htm#applications*. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Jolie Harrison (ext 166) or Kenneth Hollingshead (ext 128), Office of Protected Resources, NMFS, (301) 713–2289.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations are issued.

Authorization may be granted for periods of 5 years or less if NMFS finds that the taking will have no more than a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. In addition, NMFS must prescribe regulations that include permissible methods of taking and other means effecting the least practicable adverse impact on the species and its habitat, and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance. The regulations must include requirements pertaining to the monitoring and reporting of such taking.

Regulations governing the taking of marine mammals incidental to the U.S. Navy's operation of SURTASS LFA sonar were published on July 16, 2002 (67 FR 46712), and remain in effect until August 15, 2007. For detailed information on this action, please refer to that document. These regulations include mitigation, monitoring, and reporting requirements for the incidental taking of marine mammals by the SURTASS LFA sonar system.

On November 24, 2003, the President signed into law the National Defense Authorization Act of 2004 (NDAA) (Public Law 108–136). Included in this law were amendments to the MMPA that apply where a ''military readiness activity'' is concerned. Of specific importance for the SURTASS LFA sonar take authorization, the NDAA amended section 101(a)(5) of the MMPA to exempt military readiness activities from the ''specified geographical region'' and ''small numbers'' requirements. The term ''military readiness activity'' is defined in Public Law 107–314 (16 U.S.C. 703 note) to include all training and operations of the Armed Forces that relate to combat; and the adequate and realistic testing of military equipment, vehicles, weapons and sensors for proper operation and suitability for combat use. The term expressly does not include the routine operation of installation operating support functions, such as military offices, military exchanges, commissaries, water treatment facilities, storage facilities, schools, housing, motor pools, laundries, morale, welfare and recreation activities, shops, and mess halls; the operation of industrial activities; or the construction or demolition of facilities used for a military readiness activity.

NMFS published a proposed rule to amend its SURTASS LFA sonar final rule and regulations, to implement provisions of the NDAA (69 FR 38873; June 29, 2004). The public comment period ended on July 29, 2004. NMFS has not issued a final rule as of the date of this notice.

Summary of LOA Request

NMFS received an application from the U.S. Navy for two LOAs, one covering the *R/V Cory Chouest* and one the USNS IMPECCABLE, under the regulations issued on July 16, 2002 (67 FR 46712). The Navy requested that the LOAs become effective on August 16, 2005. The application requested authorization, for a period not to exceed 1 year, to take, by harassment, marine mammals incidental to employment of the SURTASS LFA sonar system for training, testing and routine military operations on the aforementioned ships. The application's take estimates are based on 16 nominal 9–day active sonar missions (or equivalent shorter missions) between both vessels, regardless of which vessel is performing a specific mission, not to exceed a total of 432 hours of LFA sonar transmission time combined for both vessels.

The specified geographic regions identified in the application in which the Navy proposes to operate SURTASS LFA sonar are the following oceanographic provinces described in Longhurst (1998) and identified in 50 CFR 216.180(a): the Archipelagic Deep Basins Province, the Western Pacific Warm Pool Province, and the North Pacific Tropical Gyre West Province, all within the Pacific Trade Wind Biome; the Kuroshio Current Province and the Northern Pacific Transition Zone Province within the Pacific Westerly Winds Biome; the North Pacific Epicontinental Sea Province within the Pacific Polar Biome; and the China Sea Coastal Province within the North Pacific Coastal Biome. The operational areas proposed in the Navy's application are portions of the provinces but do not encompass the entire area of the provinces. Due to critical naval warfare requirements, the U.S. Navy has identified the necessity for both SURTASS LFA sonar vessels to be stationed in the North Pacific Ocean during fiscal year 2006.

Summary of Activity Under the Current LOAs

In compliance with the 2004–2005 LOAs, on May 28, 2005, the Navy submitted the annual report on SURTASS LFA sonar operations. A summary of that report (Navy, 2005) follows.

During the period between February 16, 2004 and February 15, 2005 (the reporting period required under the 2004 LOAs), the *R/V Cory Chouest* operated in the Philippine Sea in the winter and spring of 2004. The *RV Cory Chouest* conducted four training missions covering a period of 38.8 days with 93.3 hours of transmissions by the LFA sonar array. The purposes of the training missions are to provide fully functional hardware and software, extensive personnel training, job experience, and operational/system monitoring in a variety of LFA sonar mission scenarios and acoustic environments. All LFA sonar operations included the operation of the High-Frequency Marine Mammal Monitoring (HF/M3) sonar and compliance with all mitigation requirements.

The second SURTASS LFA sonar system, onboard the USNS IMPECCABLE (T-AGOS 23), commenced sea trials in late February 2004. During the spring and summer of 2004, the USNS IMPECCABLE conducted five training missions in the Philippine Sea and the northwest Pacific Ocean covering a period of 26.2 days with 63.0 hours of transmissions by the LFA array. All LFA sonar operations included the operation of the HF/M3 sonar and compliance with all mitigation requirements.

In summary, SURTASS LFA sonar operations from February 16, 2004 to February 15, 2005 consisted of nine training missions totaling 65.1 days of operations with 156.3 hours of active transmissions by the LFA sonar array. Operations were conducted at three different sites in the Philippine sea located in the Kuroshio Current and North Pacific Tropical Gyre West Provinces.

Summary of Monitoring Under the 2004–2005 LOAs

In the annual report, the Navy provides a post-operational assessment of whether incidental harassment occurred within the LFA sonar mitigation and buffer zones and estimates of the percentages of marine mammal stocks possibly harassed using predictive modeling based on dates/times/location of actual operations, system characteristics, oceanographic conditions, and animal demographics. Post-operational incidental harassment estimates indicate that there were no marine mammal exposures to received levels at or above 180 dB (Navy, 2005).

The percentage of marine mammal stocks estimated to be exposed to noise between 120 and 180 dB (re 1 microPa) from the LFA sonar array, both pre- and post-operational risk assessment estimates, were all below the 12–percent maximum percentage authorized under the LOAs. The majority of the estimates were below 1 percent; however, there were marine mammal stocks at all three sites with more than 1 percent estimated exposed to between 120 and 180 dB: (1) east of Japan, the short-finned pilot whale (1.67 percent) and the false killer whale (1.58 percent); (2) in the North Philippine Sea, the short-finned pilot whale (1.50 percent); and (3) in the West Philippine Sea, the Pacific white-sided dolphin (9.72 percent), the melon-headed whale (9.46 percent), the false killer whale (4.22 percent), Risso's dolphin (3.6 percent), the short-finned pilot whale (3.46 percent), the humpback whale (3.27 percent), the bottlenose dolphin (2.45 percent), the Minke whale (1.75 percent), the pygmy killer whale (1.69 percent), Blainville's beaked whale (1.27 percent), and the rough-toothed dolphin (1.10 percent).

During the nine missions, no sightings of marine mammals were noted by the trained personnel responsible for marine animal monitoring, and no marine mammal vocalizations were identified on the SURTASS passive sonar displays.

The HF/M3 sonar operated continuously during the course of the missions in accordance with the LOAs. As required by the LOAs, the HF/M3 sonar was ''ramped up'' prior to operations. During seven of the nine missions, there were 12 HF/M3 alerts that were identified as possible marine mammal detections. No additional correlating data were available to further verify, identify, or clarify these detections. Because these detections met the minimum shutdown criteria (i.e., multiple detections (two or more) within the same area), the Navy's requisite protocols were followed, and LFA sonar transmissions were suspended a total of 12 times. In addition, during one mission there were two suspensions of LFA sonar operations due to HF/M3 sonar software failures.

Authorization

Accordingly, NMFS has issued two LOAs to the U.S. Navy, authorizing the incidental harassment of marine mammals incidental to operating the two SURTASS LFA sonar systems for training, testing and routine military operations. Issuance of these two LOAs is based on findings, described in the preamble to the final rule (67 FR 46712, July 16, 2002) and supported by information contained in the Navy's required annual report on SURTASS LFA sonar, that the activities described under these two LOAs will have no more than a negligible impact on marine mammal stocks and will not have an unmitigable adverse impact on the availability of the affected marine mammal stocks for subsistence uses. These LOAs also comply with the NDAA amendments to the MMPA.

These LOAs remain valid through August 15, 2006, provided the Navy remains in conformance with the conditions of the regulations and the LOAs, and the mitigation, monitoring, and reporting requirements described in 50 CFR 216.184–216.186 (67 FR 46712, July 16, 2002) and in the LOAs are undertaken.

Dated: August 22, 2005.

Michael Payne,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 05–16938 Filed 8–24–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Office of the Secretary; Defense Science Board

AGENCY: Department of Defense (DoD).

ACTION: Notice of Advisory Committee meeting; improvised explosive devices (IEDs).

SUMMARY: The Defense Science Board Task Force on Improvised Explosive Devices (IEDs) will meet in closed session on September 13, 2005, at Strategic Analysis, Inc., 3601 Wilson Boulevard, Arlington, VA. The Task Force will explore methods and techniques to significantly reduce the effects of IEDs on U.S. and coalition forces in operations such as are currently being conducted in Operation Iraqi Freedom (OIF). The Task Force should examine ways to counter the use as well as mitigate the consequences of IEDs. The Task Force should examine ways to counter the use as well as mitigate the consequences of IEDs.

DATES: September 13, 2005.

ADDRESSES: Strategic Analysis, Inc., 3601 Wilson Boulevard, Arlington, VA.

FOR FURTHER INFORMATION CONTACT: LTC Scott Dolgoff, USA, Defense Science Board, 3140 Defense Pentagon, Room 3C553, Washington, DC 20301–3140, via

e-mail at *scott.dolgoff@osd.mil*, or via phone at (703) 571–0082.

SUPPLEMENTARY INFORMATION: The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition, Technology & Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings, the Defense Science Board Task Force will consider the entire spectrum of intervention objects, including deterrence, dissuasion, remote pre-detonation, remote disarming, elimination of sources and/or manufacturing facilities, discovery and remove of critical personnel, discovery and removal of employed devices, or anything else that has the end effect of either lowering the value or raising the cost of employing IEDs as an insurgent or terrorist weapons of choice. The Task Force will have four primary objectives: Assess the current state of the art of allied forces in countering adversary use of IEDs in operations such as OIF; recommend a mid- to-long-term set of integrated activities aimed at improving the state of the art in reducing the effect of IEDs over the next three to ten years; provide recommendations on short term (over the next six months to three years) incremental improvements in U.S. forces' ability to counter or reduce the effectiveness of IEDs, and identify any synergies that may exist between current counter-IED and countermine efforts.

In accordance with section 10(d) of the Federal Advisory Committee Act, Pub. L. 92–463, as amended (5 U.S.C. App. 2), it has been determined that this Defense Science Board Task Force meeting concerns matters listed in 5 U.S.C. 552b(c)(1) and that, accordingly, this meeting will be closed to the public.

Dated: August 19, 2005.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–16911 Filed 8–24–05; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RT01–74–000]

GridSouth Transco, L.L.C., Carolina Power & Light Company, Duke Energy Corporation, South Carolina Electric & Gas Company; Notice of Filing

August 16, 2005.

Take notice that on August 11, 2005, Carolina Power & Light Company, Duke Energy Corporation, and South Carolina Electric & Gas Company, (collectively, GridSouth Sponsors) notified the Commission that they have elected to terminate the GridSouth Transco project.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on September 15, 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E5–4645 Filed 8–24–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–565–000]

Natural Gas Pipeline Company of America; Notice of Emergency Petition for Waivers

August 18, 2005.

Take notice that on August 16, 2005, Natural Gas Pipeline Company of America (Natural), pursuant to Rule 207 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, submitted an emergency petition for waivers to help its shippers respond to what it states is a *force majeure* situation that will temporarily reduce capacity on a portion of Natural's system. Natural requests that the Commission grant this petition by no later than August 23, 2005 to allow its ''customers and the market generally to mitigate the impact of the capacity reduction''.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 22, 2005.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–4639 Filed 8–24–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RT04–1–014, ER04–48–014]

Southwest Power Pool, Inc.; Notice of Filing

August 16, 2005.

Take notice that on August 9, 2005, Southwest Power Pool, Inc., (SPP) submitted for filing changes to its Bylaws and Membership Agreement, in accordance with the Commission's Order Nos. 2000 and 2000–A, and the Commission's Orders issued February 11, 2005, March 21, 2005 and May 20, 2005, in the above-referenced dockets. SPP requests an effective date of July 26, 2005.

SPP states that it has served a copy of its filing on all parties to the proceeding. In addition, SPP also states that a copy of SPP's filing had been served on all state commissions within SPP's service region. Finally, SPP indicates that SPP's filing will be posted on the SPP Web page (*http://www.spp.org.*).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 30, 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E5–4644 Filed 8–24–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER05–939–000, ER05–939–001, ER05–940–000]

Vesta Trading LP; Vesta Capital Partners, LP; Notice of Issuance of Order

August 18, 2005.

Vesta Trading LP (Vesta Trading) filed an application for market-based rate authority, with an accompanying rate tariff. The proposed rate tariff provides for the sales of capacity, energy and ancillary at market-based rates. Vesta Trading also requested waiver of various Commission regulations. In particular, Vesta Trading requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by Vesta Trading.

On August 18, 2005, pursuant to delegated authority, the Director, Division of Tariffs and Market Development—South, granted the request for blanket approval under Part 34. The Director's order also stated that the Commission would publish a separate notice in the Federal Register establishing a period of time for the filing of protests. Accordingly, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Vesta Trading should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

Notice is hereby given that the deadline for filing motions to intervene or protest is September 19, 2005.

Absent a request to be heard in opposition by the deadline above, Vesta Trading is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Vesta Trading, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Vesta Trading issuances of securities or assumptions of liability.

Copies of the full text of the Director's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov*, using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E5–4643 Filed 8–24–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–142–000]

Ocean Peaking Power, L.L.C. v. Jersey Central Power and Light Company; Notice of Complaint

August 18, 2005.

Take notice that on August 16, 2005, Ocean Peaking Power, L.L.C. (OPP) filed a complaint with the Commission against Jersey Central Power and Light Company (JCPL) pursuant to Rule 206 of the Commission's Rules of Practice and Procedure (18 CFR 385.306) for impermissibly charging OPP distribution charges for deliveries of Station Power to OPP's Lakewood, New Jersey facility when no JCPL local distribution facilities are used to deliver the Station Power.

Any person desiring to intervene or to protest this filing must file in

accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 pm Eastern Time on September 6, 2005.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–4642 Filed 8–24–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepting for Filing and Soliciting Motions To Intervene, Protests and Comments

August 18, 2005.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 12582–000.

c. *Date filed:* April 11, 2005.

d. *Applicant:* Clover Creek Hydro, LLC.

e. *Name of Project:* Byram Hydroelectric Project.

f. *Location:* On the Clover Creek portion of the Main Canal of the North Side Canal Company and Little Wood River, near Gooding, in Gooding County, ID.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. David A. O'Day, P.E., Clover Creek Hydro, LLC, P.O. Box 603, Boise, ID 83701–0603, (208) 861–1788.

i. *FERC Contact:* Etta Foster, (202) 502–8769.

j. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–12582–000) on any comments, protests, or motions filed.

k. *Description of Project:* The proposed project would consist of: (1) A diversion canal of undetermined dimensions (depending on depth to rock); (2) an overflow weir; (3) a 96-inch, 400-foot-long penstock; (3) a powerhouse containing three to four turbines with an installed capacity of 1.0 MW; (4) a 12.5 kV transmission line, approximately ¼-mile-long interconnected to the local distribution lines of the local utility; and (5) appurtenant facilities.

The project would have an estimated annual generation of 4,888,000 kWh. The applicant plans to negotiate a power sales agreement with the Idaho Power Company.

l. *Location of Application:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h. above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Competing Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

o. Competing Development Application—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

p. Notice of Intent—a notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

q. Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

r. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all

protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper; See 18 CFR 385.2001 (a)(1)(iii) and the instructions on the Commission's Web site under ''e-filing'' link. The Commission strongly encourages electronic filing.

s. Filing and Service of Responsive Documents—Any filings must bear in all capital letter the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', ''MOTION TO INTERVENE'', ''NOTICE OF INTENT'', or ''COMPETING APPLICATION'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

t. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–4640 Filed 8–24–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

August 18, 2005.

a. *Type of Application:* Applications for Amendment of Licenses to Reflect Settlement.

b. *Project Numbers:* P–2436–212, P–2447–201, P–2448–209, P–2449–179, P–2450–177, P–2451–172, P–2452–186, P–2453–208, P–2468–184, P–2580–237, and P–2599–202.

c. *Date Filed:* July 25, 2005.

d. *Applicant:* Consumers Energy Company.

e. *Name of Projects:* Foote Project (FERC No. 2436), Alcona Project (FERC No. 2447), Mio Project (FERC No. 2448), Loud Project (FERC No. 2449), Cook Project (FERC No. 2450), Rogers Project (FERC No. 2451), Hardy Project (FERC No. 2452), Five Channels Project (FERC No. 2453), Croton Project (FERC No. 2468), Tippy Project (FERC No. 2580), and Hodenpyl Project (FERC No. 2599).

f. *Location:* The projects are located on the Au Sable, Manistee, and Muskegon Rivers in Iosco, Alcona, Oscoda, Manistee, Wexford, Newaygo and Mecosta Counties, MI.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a), 825(r), 799 and 801.

h. *Applicant Contact:* Robert M. Neustifter, Consumers Energy Company, One Energy Plaza, EP11–233, Jackson, MI 49201, phone (517) 788–2974.

i. *FERC Contact:* Any questions on this notice should be addressed to Robert Fletcher at (202) 502–8901, or e-mail address: *robert.fletcher@ferc.gov*.

j. *Deadline for filing comments and or motions:* September 19, 2005.

k. *Description of Request:* The licensee filed a settlement offer between itself, U.S. Forest Service, U.S. Fish and Wildlife Service, Michigan Department of Natural Resources, and Michigan Hydro Relicensing Coalition. The settlement concerns the resolution of various disputes and issues regarding the content and application of articles 408, 409, and 414 (415 for the Tippy Project) for the 11 projects listed. The settlement will provide for revised amounts of contributions to be made under these articles which will fund activities like fish habitat restoration and fish management purposes within the Muskegon, Manistee, and Au Sable River watersheds. The licensee proposes to amend the provisions within each of these articles to reflect the settlement.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*, for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers (P–2436, P–2447, P–2448, P–2449, P–2450, P–2451, P–2452, P–2453, P–2468, P–2580, and P–2599). All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments—Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web

site at *http://www.ferc.gov* under the ''e-Filing'' link.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–4641 Filed 8–24–05; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[OAR–2003–0034, FRL–7958–6]

Agency Information Collection Activities; Proposed Collection; Comment Request; Reporting Requirements Under EPA's Voluntary Aluminum Industrial Partnership (VAIP), EPA ICR Number 1867.03, OMB Control Number 2060–0411

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB). This is a request to renew an existing approved collection. This ICR is scheduled to expire on 12/30/05. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before October 24, 2005.

ADDRESSES: Submit your comments, referencing docket ID number OAR–2003–0034, to EPA online using EDOCKET (our preferred method), by e-mail to *a-and-r-Docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Air and Radiation Docket, 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Sally Rand, Office of Atmospheric Programs, 6207J, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–343–9739; fax number: 202–343–2208; e-mail address: *rand.sally#epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has established a public docket for this ICR under Docket ID number OAR–2003–0034, which is available for public viewing at the Air and Radiation Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket is (202) 566–1742. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.* Use EDOCKET to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, ''search,'' then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA within 60 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov./edocket.*

Affected Entities: Entities potentially affected by this action are those engaged in primary aluminum production.

Title: Reporting Requirements under the Voluntary Aluminum Industrial Partnership (VAIP).

Abstract: EPA's Voluntary Aluminum Industrial Partnership (VAIP) was initiated in 1995 and is an important voluntary program contributing to the overall reduction in emissions of greenhouse gases. This program focuses on reducing direct greenhouse gas emissions including perfluocorcarbon (PFC) and carbon dioxide (CO_2) emissions from the production of primary aluminum. Seven of the eight U.S. producers of primary aluminum participate in this program. PFCs are very potent greenhouse gases with global warning potentials several thousand times that of carbon dioxide and they persist in the atmosphere for thousands of years. CO_2 is emitted from consumption of the carbon anode. EPA has developed this ICR to renew authorization to collect information from companies in the VAIP. Participants voluntarily agree to the following: designating a VAIP liaison; undertaking technically feasible and cost-effective actions to reduce PFC and direct CO_2 emissions; and reporting to EPA, on an annual basis, the PFC and CO_2 emissions or production parameters used to estimate emissions. The information contained in the annual reports of VAIP members is used by EPA to assess the success of the program in achieving its goals. The information contained in the annual reports may be considered confidential business information and is maintained as such. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

The EPA would like to solicit comments to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Burden Statement: The VAIP is a continuing program and, as such, the burden for collecting relevant information has not changed significantly overtime as data collection processes have remained the same and no new one-time cost activities are expected that would impact all respondents. VAIP participants sign a voluntary Memorandum of Understanding (MOU) which assigns responsibilities to EPA and participating companies. The MOU has been signed each of the seven participating

companies and not expected to be revised or renewed. The annual public reporting and recordkeeping burden for this collection of information is estimated to average 98.5 hours per response. The projected hour burden for this collection of information is as follows:

Average Annual Reporting Burden: 82 hours.

Average Annual RecordKeeping Burden: 0 hours.

Average Burden Hours/Response: 82 hours for the annual tracking report; and 16.5 hours associated with additional activities such as partnership meetings. Frequency of response=one per respondent per year. Estimated number of respondents per year=7. Cost burden to respondents ($7,354 per respondent).

Estimated Total Annualized Cost Burden: $51,478.

Total Labor Costs: $51,478.

Total Capital and Start-up Costs: $0.

Estimated Total Operation and Maintenance Costs: $0.

Purchase of Services Costs: $0.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review and collection of information; and transmit or otherwise disclose the information.

Dated: August 16, 2005.

Francisco de la Chesnaye,

Acting Director, Climate Protection Division.

[FR Doc. 05–16935 Filed 8–24–05; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

Agency Information Collection Activities: Proposed Collection; Comment Request; Assessment of Indoor Air Quality Outreach Products and Services, EPA ICR Number 2190.01; Correction

AGENCY: Environmental Protection Agency.

ACTION: Notice; correction.

SUMMARY: The Environmental Protection Agency published a notice in the **Federal Register** of July 16, 2005, concerning a request for comments on an information collection request regarding the assessment of indoor air quality outreach products and services. The document contained an incorrect date.

FOR FURTHER INFORMATION CONTACT: John M Hall, 202–343–9453.

Correction

In the **Federal Register** of July 16, 2005, in FR Doc. 05–16221, on page 48130, in the first column, correct the **DATE** caption to read:

DATES: Comments must be submitted on or before October 15, 2005.

Dated: July 18, 2005.

Thomas E. Kelly,

Director, Indoor Environments Division, Environmental Protection Agency.

[FR Doc. 05–16934 Filed 8–24–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7959–9]

Notice of a Public Meeting on Designated Uses and Use Attainability Analyses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of a public meeting.

SUMMARY: The Environmental Protection Agency (EPA) is holding a public meeting to discuss designated uses and use attainability analyses. The meeting is co-sponsored with the Water Environment Federation (WEF). The primary goals of the meeting are to help educate the public on current water quality standards regulations, guidance and practices related to designated uses and use attainability analyses, and to provide a forum for the public to join in discussions, ask questions, and provide feedback.

DATES: The meeting will be held on Tuesday, September 20, 2005, from 12:30 p.m. to 5:30 p.m. The meeting will continue on Wednesday, September 21, 2005, from 8:30 a.m. to 3 p.m. All times are Eastern Daylight Time.

ADDRESSES: The meeting will be held at the Westin Peachtree Plaza, 210 Peachtree Street NW., Atlanta GA 30303, across the street from the Peachtree Center MARTA station. The telephone number for the hotel is (404) 659–1400. A block of rooms has been reserved. When making room reservations, please reference the group name ''EPA Multi-Stakeholders Meeting''. The cutoff date for the reserved block of rooms is Friday, August 26th.

FOR FURTHER INFORMATION CONTACT: Ms. Patricia Harrigan, Standards and Health Protection Division, MC 4305T, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; Telephone number: (202) 566–1666; Fax number: (202) 566–1054; e-mail address: *harrigan.patricia@epa.gov*.

SUPPLEMENTARY INFORMATION: The purpose of this public meeting is to help educate the public on current water quality standards regulations, guidance and practices related to designated uses and use attainability analyses, and to provide a forum for the public to join in discussions, ask questions, and provide feedback. EPA also welcomes written remarks received by September 21, 2005, which can be sent to Ms. Harrigan by e-mail or by mail at the address listed in the **FOR FURTHER INFORMATION CONTACT** section.

Additional Meetings

EPA anticipates announcing and holding two additional public meetings on these subjects in 2006. One meeting will likely be held in the midwestern U.S., and the other will likely be held in the western U.S.

Special Accommodations

Any person needing special accommodations at this meeting, including wheelchair access, should contact Ms. Harrigan at the phone number or e-mail address listed in the **FOR FURTHER INFORMATION CONTACT** section. Requests for special accommodations should be made at least five business days in advance of the public meeting.

Dated: August 12, 2005.

Ephraim King,

Director, Office of Science and Technology.

[FR Doc. 05–16928 Filed 8–24–05; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may obtain copies of agreements by contacting the Commission's Office of Agreements at 202–523–5793 or via e-mail at *tradeanalysis@fmc.gov*. Interested parties may submit comments on an

agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days of the date this notice appears in the **Federal Register**.

Agreement No.: 010050–016.

Title: U.S. Flag Discussion Agreement.

Parties: American President Lines, Ltd.; A.P. Moller-Maersk A/S; Lykes Lines Limited, LLC; P&O Nedlloyd Limited; and Farrell Lines Incorporated.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW., Suite 900; Washington, DC 20036.

Synopsis: The amendment adds APL Co. PTE Ltd. as a party to the agreement.

By Order of the Federal Maritime Commission.

August 19, 2005.

Bryant VanBrakle,

Secretary.

[FR Doc. 05–16856 Filed 8–24–05; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocations

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, effective on the corresponding date shown below:

LICENSE NUMBER: 018231F
NAME: All American Cargo-Servicios Nicaraguenses, Corp.
ADDRESS: 1925 NW 21st Terrace, Miami, FL 33142
DATE REVOKED: July 14, 2005.
REASON: Failed to maintain a valid bond.

LICENSE NUMBER: 018861N
NAME: Central American Shipping Agency Inc.
ADDRESS: 55 West Main Street, Freehold, NJ 07728
DATE REVOKED: July 14, 2005.
REASON: Failed to maintain a valid bond.

LICENSE NUMBER: 015913N
NAME: Fastgrow International Co., Inc.
ADDRESS: 2211 South Hacienda Blvd., Suite 216, Hacienda Heights, CA 91745
DATE REVOKED: July 16, 2005.
REASON: Failed to maintain a valid bond.

LICENSE NUMBER: 002433F
NAME: Impex International Brokerage, Inc.
ADDRESS: 8460 NW 30th Terrace, Miami, FL 33122
DATE REVOKED: July 20, 2005.
REASON : Failed to maintain a valid bond.

LICENSE NUMBER: 017339F
NAME: In-House Forwarding, LLC
ADDRESS: 1011 Derussey Road, New London, OH 44851
DATE REVOKED: July 13, 2005.
REASON: Surrendered license voluntarily.

LICENSE NUMBER: 004246F
NAME: International Shipping Link, Inc.
ADDRESS: 2418 W. Devon Avenue, Chicago, IL 60659
DATE REVOKED: February 10, 2005.
REASON: Failed to maintain a valid bond.

LICENSE NUMBER: 017573F
NAME: Kallista USA, LLC
ADDRESS: 7204 NW 84th Avenue, Miami, FL 33166
DATE REVOKED: July 30, 2005.
REASON: Failed to maintain a valid bond.

LICENSE NUMBER: 010835N
NAME: Ki Chul Kim dba Intercontinental Trade & Transportation
ADDRESS: 550 Carson Plaza Drive, Suite 113, Carson, CA 90746
DATE REVOKED: July 9, 2005.
REASON: Failed to maintain a valid bond.

LICENSE NUMBER: 018580NF
NAME: Kingsco Shipping Line, Inc.
ADDRESS: 500 Carson Plaza Drive, Carson, CA 90746
DATE REVOKED: July 27, 2005.
REASON: Surrendered license voluntarily.

LICENSE NUMBER: 018227NF
NAME: Latek Logistics, Inc.
ADDRESS: Ahi Aven Cad. No: 1 Ata Center, Kat: 3 80870 Masjak, Istanbul, Turkey
DATE REVOKED: July 18, 2005.
REASON: Surrendered license voluntarily.

LICENSE NUMBER: 004553F
NAME: Marianas Steamship Agencies, Inc.
ADDRESS: Commercial Port, Apra Harbor, P.O. Box 3219, Agana, Guam 96910
DATE REVOKED: July 14, 2005.
REASON: Failed to maintain a valid bond.

LICENSE NUMBER: 002710NF
NAME: Mario C. Bravo dba Air Waves International Freight Services
ADDRESS: 615 Nash Street, Suite 204, El Segundo, CA 90245
DATE REVOKED: April 2, 2005.
REASON: Failed to maintain valid bonds.

LICENSE NUMBER: 012893N
NAME: Midwest Intermodal Services, Inc.
ADDRESS: 535 E. 14th Avenue, North Kansas City, MO 64113
DATE REVOKED: July 15, 2005.
REASON: Failed to maintain a valid bond.

LICENSE NUMBER: 015688N
NAME: Millennium Logistics Services, Inc.
ADDRESS: 6810 NW 82nd Avenue, Miami, FL 33196
DATE REVOKED: June 10, 2005.
REASON: Failed to maintain a valid bond.

LICENSE NUMBER: 018634N
NAME: Online Shipping Advisers Inc.
ADDRESS: 5783 Rina Court, Fontana, CA 92336
DATE REVOKED: July 26, 2005.
REASON: Failed to maintain a valid bond.

LICENSE NUMBER: 018765N
NAME: PR Logistics Corporation
ADDRESS: Hato Tejas Industrial Park, Street C, Lot #6, Hato Tejas, Bayamon, PR 00950
DATE REVOKED: July 21, 2005.
REASON: Failed to maintain a valid bond.

LICENSE NUMBER: 018893N
NAME: Polish Cargo Center, Inc.
ADDRESS: 2718 Orthodox Street, Philadelphia, PA 19137
DATE REVOKED: June 2, 2005.
REASON: Failed to maintain a valid bond.

LICENSE NUMBER: 000842NF
NAME: Premier Shipping Co., Inc.
ADDRESS: 144 Oakwood Road East, Watchung, NJ 07069
DATE REVOKED: July 26, 2005.
REASON: Failed to maintain valid bonds.

LICENSE NUMBER: 012702N
NAME: S.E.S. International Express, Inc.
ADDRESS: 10105 Doty Avenue, Inglewood, CA 90303
DATE REVOKED: July 20, 2005.
REASON: Failed to maintain a valid bond.

LICENSE NUMBER: 018956N
NAME: SWT Shipping USA, Inc.
ADDRESS: 4034 W 21st Street, Los Angeles, CA 90018
DATE REVOKED: July 30, 2005.
REASON: Failed to maintain a valid bond.

LICENSE NUMBER: 018997NF
NAME: Trident Maritime Transport, LLC
ADDRESS: 13831 SW 59th Street, #208B, Miami, FL 33183
DATE REVOKED: July 21, 2005.

REASON: Failed to maintain valid bonds.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. 05–16855 Filed 8–24–05; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Reissuances

Notice is hereby given that the following Ocean Transportation Intermediary licenses have been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515.

License No.	Name/address	Date reissued
007699N	Caribbean American Freight, Inc., 9393 NW., 13th Street, Miami, FL 33172	June 16, 2005.
001278F	Interproject Shipping Services, Inc., 10 Exchange Place, 19th Floor, Jersey City, NJ 07302	July 1, 2005.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. 05–16857 Filed 8–24–05; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. app. 1718 and 46 CFR part 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel-Operating Common Carrier Ocean Transportation Intermediary Applicants:

M & M Cargo Express, Corp., 338 NW 12th Avenue, Miami, FL 33128. *Officer:* Rommel M. Briceno, Corporate Officer (Qualifying Individual)

Rasscom USA, LLC, 19201 Susana Road, Rancho Dominguez, CA 90221. *Officers:* Ernest L. Givens, Vice President (Qualifying Individual) John Yelland, President

Polish Cargo Shipping Center, Inc., 2850 Brunswick Pike, Lawrenceville, NJ 08648. *Officers:* Miroslaw K. Adolf, Partner (Qualifying Individual) M. Pghemek Adolf, President

American Freight Logistics, Inc., 1077 E. Magnolia Blvd., Burbank, CA 91501. *Officers:* Yan (Sandy) Yu, Secretary (Qualifying Individual) Xiao Rong (Jennifer) McCormick, President

Los Paisanos Export & Import Corp., 880 SW 1st Street, Miami, FL 33130. *Officer:* Vicente Alejandro Pavon, President (Qualifying Individual)

Fond Express Logistics Inc., 10418 La Cienega Blvd., Inglewood, CA 90304. *Officer:* Ernest So, President (Qualifying Individual)

Cargo Distribution International, Inc., 221 Joey Drive, Suite A, Elk Grove Village, IL 60007. *Officer:* Constantine Dussias, President (Qualifying Individual)

Oceanic General Agency, Inc., Metro Office Park, Building Lot No. 11, Guaynabo, Puerto Rico 00968. *Officers:* David R. Sagarra, Jr., President (Qualifying Individual) Salustiano Alvez Mendez, Vice President

Integrated Creative Resources Initiatives, Corporation dba Inquirer Golden Bells Cargo, 500 E. Carson Street, #209, Carson, CA 90745. *Officers:* Solomon Pineda, Vice President (Qualifying Individual) Aurelio S. Agcaoili, President

Francisca Envios, Inc., 1749 NW 21 Terrace, Miami, FL 33142. *Officer:* Jose Omar Cabrera, Vice President (Qualifying Individual)

Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants:

Altorky Group Inc. dba In & Out Cargo, 6201 Bonhomme, #208–N, Houston, TX 77036. *Officers:* Ahmed K. Ibrahim, President (Qualifying Individual) Amal M. Chehade, Vice President

Export Service International Forwarding LLC, 13225 FM 529, Suite 204, Houston, TX 77041. *Officers:* Kelly Leger, President (Qualifying Individual) Lester Leger, Vice President

LMJ International Logistics, LLC, 2227 U.S. Hwy No. 1, Suite 179, North Brunswick, NJ 08902. *Officer:* Leila Jubran, President (Qualifying Individual)

Unity Shipping, Inc. dba Unity Logistics Group, 10305 NW 41st Street, Suite 135, Miami, FL 33178. *Officers:* Albert De Rojas, President (Qualifying Individual) Steven Calderon, Vice President

James Global Logistics, Inc., 405 Atlantis Road, Suite A–107, Cape Canaveral, FL 32920. *Officer:* James F. Hahn, President (Qualifying Individual)

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants:

FT Worldwide, LLC, 2979 Rushland Road, Jamison, PA 18929. *Officer:* Michael Shragher, President (Qualifying Individual)

Elite International Services, Inc., 1535 Land Road, Dalton, GA 30721. *Officer:* Linnie Michelle Cox, President (Qualifying Individual)

Dated: August 19, 2005.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 05–16858 Filed 8–24–05; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the

proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than September 19, 2005.

A. Federal Reserve Bank of Chicago (Patrick M. Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. CCB Acquisition Corp., Oak Brook, Illinois; to become a bank holding company by acquiring 100 percent of the voting shares of Citizens Central Bancorp, Inc., Macomb, Illinois, and thereby indirectly acquire the voting shares of Citizens National Bank, Macomb, Illinois.

2. Commercial Bancshares, Inc., Whitewater, Wisconsin; to become a bank holding company by acquiring 100 percent of the voting shares of Commercial Bank, Whitewater, Wisconsin.

Board of Governors of the Federal Reserve System, August 19, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–16887 Filed 8–24–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities; Correction

This notice corrects a notice (FR Doc. 05-16249) published on page 48422 of the issue for Wednesday, August 17, 2005.

Under the Federal Reserve Bank of Minneapolis heading, the entry for Frandsen Financial Corporation, Arden Hills, Minnesota, is revised to read as follows:

A. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480-0291:

1. Frandsen Financial Corporation, Forest Lake, Minnesota; to acquire QCF Bancorp, Virginia, Minnesota, and thereby indirectly acquire Queen City Federal Savings Bank, Virginia, Minnesota, and engage in owning and operating a savings and loan association, pursuant to section 225.28(b)(4)(ii) of Regulation Y.

Comments on this application must be received by September 9, 2005.

Board of Governors of the Federal Reserve System, August 19, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–16886 Filed 8–24–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Reinstatement of Existing Collection; Comment Request

AGENCY: Federal Trade Commission (Commission or FTC).

ACTION: Notice.

SUMMARY: The FTC intends to conduct a survey of consumers to advance its understanding of the incidence of identity theft (''ID Theft'') and to allow the FTC to better serve the people who experience it and the law enforcement agencies that investigate and prosecute it. The survey is a follow-up to the FTC's ID Theft Survey conducted in March 2003 and released in September 2003. Before gathering this information, the FTC is seeking public comments on its proposed consumer research. Comments will be considered before the FTC submits a request for Office of Management and Budget (OMB) review under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3520.

DATES: Comments must be received on or before October 24, 2005.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to ''ID Theft Survey: FTC File No. P034303'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope and should be mailed or delivered, with two complete copies, to the following address: Federal Trade Commission/Office of the Secretary, Room H–135 (Annex E), 600 Pennsylvania Avenue, NW., Washington, DC 20580. Because paper mail in the Washington area and at the Commission is subject to delay, please consider submitting your comments in electronic form, as prescribed below. However, if the comment contains any material for which confidential treatment is requested, it must be filed in paper form, and the first page of the document must be clearly labeled ''Confidential.'' [1] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible.

Comments filed in electronic form should be submitted by clicking on the following Web link: *https://secure.commentworks.com/FTC-IDTSurvey* and following the instructions on the Web-based form. To ensure that the Commission considers an electronic comment, you must file it on the Web-based form at the *https://secure.commentworks.com/FTC-IDTSurvey* Web link. If this notice appears at *http://www.regulations.gov*, you may also file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments will be considered by the Commission and will be available to the public on the FTC Web site, to the extent practicable, at *www.ftc.gov*. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy at *http://www.ftc.gov/ftc/privacy.htm*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be addressed to Joanna P. Crane, Program Manager, Federal Trade Commission ID Theft Program, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–3228.

SUPPLEMENTARY INFORMATION:

Under the PRA, Federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. ''Collection of information'' means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3), 5 CFR 1320.3(c). In 2003, OMB approved the FTC's request to conduct a survey on ID Theft and assigned OMB

[1] Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

Control Number 3084–0124. The FTC completed the consumer research in April 2003 and issued its report, Federal Trade Commission—Identity Theft Survey Report, in September 2003.[2] As required by section 3506(c)(2)(A) of the PRA, the FTC is providing this opportunity for public comment before requesting that OMB reinstate the clearance for the survey, which expired in June 2003.

The FTC invites comments on: (1) Whether the proposed collections of information are necessary for the proper performance of the functions of the FTC, including whether the information will have practical utility; (2) the accuracy of the FTC's estimate of the burden of the proposed collections of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of collecting information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before October 24, 2005.

1. Description of the Collection of Information and Proposed Use

The FTC proposes to survey up to 5,000 consumers in order to gather specific information on the incidence of ID Theft in the general population. All information will be collected on a voluntary basis, and the identities of the consumers will remain confidential. Subject to OMB approval for the survey, the FTC has contracted with a consumer research firm to identify consumers and conduct the survey. The results will assist the FTC in determining the incidence of ID Theft in the general population and whether the type and frequency of ID Theft is changing, and will inform the FTC about how best to combat ID Theft.

ID Theft has been the top consumer complaint reported to the FTC since calendar year 2000. The information collected by the survey will ensure that the FTC has accurate and timely information on the extent of ID Theft and its impact on victims. This information will be highly useful to Congress and others who often request statistical information on ID Theft from the FTC.

The FTC intends to use a larger sample size than the 2003 survey to allow for a more in-depth analysis of the resulting data. The additional data points will allow for statistically significant samples for particular types of ID Theft and particular demographic characteristics. The questions will be very similar to the 2003 survey so that the results from the 2003 survey can be used as a baseline for a time-series analysis.[3] The FTC may choose to conduct another follow-up survey in approximately two years.

2. Estimated Hours Burden

The FTC will pretest the survey on approximately 100 respondents to ensure that all questions are easily understood. This pretest will take approximately 3 minutes on average per person and 5 hours as a whole (100 respondents × 3 minutes each). Based on FTC staff's experience with the 2003 survey, the staff estimates that approximately 12 percent of those interviewed will have experienced ID Theft within the last 5 years. Survey participants who have not experienced ID Theft in this period of time will only be asked the initial 4 or 5 survey questions. The staff expects that this will take less than 2 minutes. For those who have experienced ID Theft in the last 5 years, our experience with the earlier survey suggests that it will take about 12 to 15 minutes to complete the survey. The staff therefore anticipates that the average time per survey participant will be approximately 3 minutes. Answering the consumer survey will require approximately 250 hours as a whole (5,000 respondents × 3 minutes each). Thus, cumulative total burden hours for the first year of the clearance will approximate 255 hours.

3. Estimated Cost Burden

The cost per respondent should be negligible. Participation is voluntary and will not require start-up, capital, or labor expenditures by respondents.

Christian S. White,

Acting General Counsel.

[FR Doc. 05–16888 Filed 8–24–05; 8:45 am]

BILLING CODE 6750–01–P

[2] The Report is available at *http://www.ftc.gov/os/2003/09/synovatereport.pdf.*

[3] The questionnaire for the 2003 survey is available as Appendix A to the Report.

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request; Extension

AGENCY: Federal Trade Commission (FTC).

ACTION: Notice.

SUMMARY: The FTC is seeking public comments on its proposal to extend through December 31, 2008 the current Paperwork Reduction Act (''PRA'') clearance for information collection requirements contained in its Fuel Rating Rule (''Rule''). That clearance expires on December 31, 2005.

DATES: Comments must be received on or before October 24, 2005.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to ''Fuel Rating Rule: FTC File No. R811005'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope and should be mailed or delivered, with two complete copies, to the following address: Federal Trade Commission, Room H 135 (Annex J), 600 Pennsylvania Ave., NW., Washington, DC 20580. Because paper mail in the Washington area and at the Commission is subject to delay, please consider submitting your comments in electronic form, (in ASCII format, WordPerfect, or Microsoft Word) as part of or as an attachment to e-mail messages directed to the following e-mail box: *paperworkcomment@ftc.gov*. However, if the comment contains any material for which confidential treatment is requested, it must be filed in paper form, and the first page of the document must be clearly labeled ''Confidential.'' [1]

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments will be considered by the Commission and will be available to the public on the FTC website, to the extent practicable, at *www.ftc.gov*. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy at *http://www.ftc.gov/ftc/privacy.htm*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information

[1] Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

requirements should be sent to Neil Blickman, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., NW., Washington, DC 20580, (202) 326–3038.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3520, Federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. ''Collection of information'' means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c). As required by section 3506(c)(2)(A) of the PRA, the FTC is providing this opportunity for public comment before requesting that OMB extend the existing paperwork clearance for the regulations noted herein.

The FTC invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before October 24, 2005.

The Fuel Rating Rule, 16 CFR part 306 (OMB Control Number: 3084–0068), establishes standard procedures for determining, certifying, and disclosing the octane rating of automotive gasoline and the automotive fuel rating of alternative liquid automotive fuels, as required by the Petroleum Marketing Practices Act. 15 U.S.C. 2822(a)–(c). The Rule also requires refiners, producers, importers, distributors, and retailers to retain records showing how the ratings were determined, including delivery tickets or letters of certification.

Estimated annual hours burden: [2] 40,000 total burden hours (16,000 recordkeeping hours + 24,000 disclosure hours).

Recordkeeping: Based on industry sources, staff estimates that 195,000 fuel industry members each incur an average annual burden of approximately five minutes to ensure retention of relevant business records for the period required by the Rule, resulting in a total of 16,000 hours.

Disclosure: Staff estimates that affected industry members incur an average burden of approximately one hour to produce, distribute, and post octane rating labels. Because the labels are durable, only about one of every eight industry members (*i.e.*, approximately 24,000 of 195,000 industry members) incur this burden each year, resulting in a total annual burden of 24,000 hours.

Estimated annual cost burden: $804,000 ($720,000 in labor costs and $84,000 in non-labor costs).

Labor costs: Staff estimates that the work associated with the Rule's recordkeeping and disclosure requirements is performed by skilled information and record clerks at an average rate of $18.00 per hour. Thus, the annual labor cost to respondents of complying with the recordkeeping and disclosure requirements of the Rule is estimated to be $720,000 ((16,000 hours + 24,000 hours) × $18.00 per hour).

Capital or other non-labor costs: $84,000.

Staff believes that there are no current start-up costs associated with the Rule. Because the Rule has been effective since 1979 for gasoline, and since 1993 for liquid alternative automotive fuels, industry members already have in place the capital equipment and other means necessary to comply with the Rule. Retailers (approximately 170,000 industry members), however, do incur the cost of procuring (and replacing) fuel dispenser labels to comply with the Rule. According to industry input, the price per label is about fifty cents. Based on ranging industry estimates of a 6–10 year useful life per dispenser label, staff will conservatively factor into its calculation of labeling cost the shortest assumed useful life, *i.e.*, 6 years. Staff believes that the average retailer has six dispensers, with all of them being obtained either simultaneously or otherwise within the same year. Assuming that, in any given year, 1/6th of all retailers (28,000 retailers) will replace their dispenser labels, staff estimates total labeling cost to be $84,000 ($28,333 \times 6 \times .50$).

Christian S. White,

Acting General Counsel.

[FR Doc. 05–16889 Filed 8–24–05; 8:45 am]

BILLING CODE 6750–01–P

[2] All numbers pertaining to hours and cost burden estimates have been rounded to the nearest thousand.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–05–05CK]

Proposed Data Collections Submitted for Public Comment and Recommendations

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 371–5974 or send an e-mail to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

Collection of Assessment Information about the Centers for Disease Control and Prevention Publications—NEW—National Center for Health Marketing (NCHM), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

As part of CDC's Future's Initiative, the National Center for Health Marketing was created to ensure that health information, interventions, and programs at CDC are based on sound science.

Numerous CDC-operated communication platforms targeting scientific, professional, and technical audiences have been developed in the past twenty years. The reach of many of these platforms has increased significantly in the past five years. In order to ensure future growth, it is critical to obtain feedback from subscribers of these platforms to understand who uses them, how they use them, how satisfied they are with the platforms, and solicit suggestions on ways to improve each platform to bolster satisfaction. The data collected from this effort will allow us to answer critical operating questions, including:

- Which audiences (*e.g.*, doctors, local health officials, researchers, etc.) receive their information from which CDC platforms?
- How often and with what purpose do they access CDC platforms?
- How satisfied are subscribers of the platforms with the content and delivery of information?
- Are there ways to enhance the platforms for the subscriber through improvements to current offerings or through new products / services?
- Who are our most critical target audiences, *i.e.*, what are our publication and dissemination priorities in service to our health impact goals?

The purpose of this project is to evaluate the content, processes, and channels through which CDC communicates scientific information to partners and customers to ensure that health impact is maximized through the delivery of timely, effective, and credible information, which will result in optimal benefit for public health. The evaluation will help to ensure that these platforms meet subscriber and partner priorities, build CDC's brand, and contribute to health impact goals. Feedback from the subscriber base is necessary to fully evaluate the performance of CDC's platforms.

At this time, the scope of this project is limited to five communication platforms owned and managed by CDC which transmits information primarily intended for scientific and professional audiences. However, future plans include adding additional publications as needed. The initial five communications platforms are: Emerging Infections Journal, MMWR, Epi-X, Preventing Chronic Diseases Journal, and Health Alert Network. We want to ensure that the timeliness, effectiveness, and credibility of this communication maximizes the health impact of that information, resulting in optimum benefit for public health. These channels include both print and electronic versions of the five platforms. There is no cost to respondents other than their time. The total estimated burden hours are 18,970.

ESTIMATES OF ANNUALIZED BURDEN HOURS

Form	Respondents	Responses per respondent	Hrs/response (in hrs)
MMWR	30,000	1	20/60
EID	12,750	1	20/60
PCD	10,500	1	20/60
Epi-X	1,650	1	20/60
HAN	2,000	1	20/60

Dated: August 18, 2005.

Joan F. Karr,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 05–16894 Filed 8–24–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–05–05AF]

Proposed Data Collections Submitted for Public Comment and Recommendations

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 371–5983 or send an e-mail to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

How Miners Modify Their Behavior In Response To Personal Dust Monitor Information—New—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Federal Mine Safety & Health Act of 1977, Section 501, and the Occupational Safety and Health Act of 1970, Public Law 91–256 enables CDC/NIOSH to carry out research relevant to the health and safety of workers in the mining industry. The objective of this project is to document how coal miners can use real-time information from their personal dust monitors (PDM) to reduce their exposure to respirable dust. The specific aims are to (1) identify several specific examples of how miners use PDM information to discover which parts of their jobs and/or which aspects of their work environment may be causing them to be overexposed to respirable dust, and (2) identify the types of changes that miners could make in order to try to reduce their exposure. Although the most recent data on the prevalence of Coal Workers' Pneumoconiosis (CWP) in the United States indicates that it is declining, substantial numbers of CWP cases continue to be diagnosed. In recent years, CWP has contributed to the deaths of approximately 1,000 people in the U.S. each year.

A personal dust monitor (PDM) has recently been developed through a collaboration involving NIOSH, the Bituminous Coal Operators' Association, the United Mine Workers of America, the National Mining Association, and Rupprecht & Patashnick Co., Inc. This new device represents a major advance in the tools available for assessing coal miners' exposure to respirable dust levels. It will soon be field tested with coal miners throughout the U.S. As with the introduction of any new technology, it is very important to systematically document how workers react to it and make use of it. If miners know how to properly use the information PDMs are capable of providing, they should be able to make adjustments to their work place or work procedures that will reduce their exposure to respirable coal dust.

Various parties have speculated about the processes by which miners will use the information to reduce their exposure to respirable dust. There appears to be great potential. However, no one knows precisely how miners performing a wide variety of tasks and jobs are actually going to use this new information to reduce their exposure to dust. It is assumed that, once PDMs are introduced, miners will eventually find new ways to reduce their exposure to

dust. Once these discoveries are made, they need to be documented and shared throughout the industry.

The diffusion of this innovation will occur much more rapidly and efficiently if this proposed study takes place. Effective strategies for using PDM information will be well documented and quickly shared throughout the coal industry. The alternative is to wait for the miners at each of the 482 actively producing coal mines in the U.S. to go through their own trial and error process of discovering how PDMs can and cannot be used to reduce dust exposure. The proposed study will help to significantly reduce the incidence of lung disease among coal miners, leading to improvements in their longevity and quality of life.

The information for this study will be collected by conducting one-on-one structured interviews with approximately 20 miners at each of 5 mines located throughout the major coal producing regions of the U.S.

This survey will last 2 years. There will be no cost to respondents except their time to participate. The total estimated annualized burden hours are 25.

ESTIMATE OF ANNUALIZED BURDEN TABLE

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Coal Miners	50	1	30/60

Dated: August 18, 2005.

Joan F. Karr,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 05–16895 Filed 8–24–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2005N–0296]

Agency Information Collection Activities; Proposed Collection; Comment Request; Financial Disclosure by Clinical Investigators

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on information requiring the sponsor of any drug, biologic, or device marketing application to certify to the absence of clinical investigators and/or disclose those financial interests as required, when covered clinical studies are submitted to FDA in support of product marketing.

DATES: Submit written or electronic comments on the collection of information by October 24, 2005.

ADDRESSES: Submit electronic comments on the collection of information to: *http://www.fda.gov/dockets/ecomments.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Karen L. Nelson, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1482.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Financial Disclosure by Clinical Investigators (OMB Control Number 0910–0396)—Extension

Respondents are sponsors of marketing applications that contain clinical data from studies covered by the regulations. These sponsors represent pharmaceutical, biologic and medical device firms. The applicant will incur reporting costs in order to comply with the final rule. Applicants will be required to submit, for example, the complete list of clinical investigators for each covered study, not employed by the applicant and/or sponsor of the covered study, and either certify to the absence of certain financial arrangements with clinical investigators or disclose the nature of those arrangements to FDA and the steps taken by the applicant or sponsor to minimize the potential for bias. The clinical investigator will have to supply information regarding financial interests or payments held in the sponsor of the covered study. FDA has said that it has no preference as to how this information is collected from investigators and that sponsors/applicants have the flexibility to collect the information in the most efficient and least burdensome manner that will be effective. FDA estimated

that the total reporting costs of sponsors would be less than $450,000 annually. Costs could also occur after a marketing application is submitted if FDA determines that the financial interests of an investigator raise significant questions about the integrity of the data.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours Per Response	Total Hours
54.4(a)(1) and (a)(2)	1,000	1	1,000	5	5,000
54.4(a)(3)	100	1	100	20	2,000
54.4	46,000	.25	11,500	.1	11,500
Total					18,500

[1]There are no capital cost or operating and maintenance costs associated with this collection of information.

The sponsors of covered studies will be required to maintain complete records of compensation agreements with any compensation paid to nonemployee clinical investigators, including information showing any financial interests held by the clinical investigator, for a time period of 2 years after the date of approval of the applications. This time is consistent with the current recordkeeping requirements for other information related to marketing applications for human drugs, biologics, and medical devices. Currently, sponsors of covered studies must maintain many records with regard to clinical investigators, including protocol agreements and investigator resumes or curriculum vitae. FDA estimates than an average of 15 minutes will be required for each recordkeeper to add this record to clinical investigators' file.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours Per Recordkeeper	Total Hours
54.6	1,000	1	1,000	.25	250
Total					250

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: August 17, 2005.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 05–16915 Filed 8–24–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2005D–0264]

Guidance for Industry and Food and Drug Administration Staff; Class II Special Controls Guidance Document: Ribonucleic Acid Preanalytical Systems (Ribonucleic Acid Collection, Stabilization and Purification Systems for Real Time Polymerase Chain Reaction Used in Molecular Diagnostic Testing); Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance entitled ''Class II Special Controls Guidance Document: RNA Preanalytical Systems (RNA Collection, Stabilization and Purification Systems for RT–PCR used in Molecular Diagnostic Testing).'' This guidance document describes a means by which Ribonucleic Acid (RNA) preanalytical systems may comply with the requirement of special controls for class II devices. Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule to classify RNA preanalytical systems into class II (special controls). This guidance document is immediately in effect as the special control for RNA preanalytical systems but it remains subject to comment in accordance with the agency's good guidance practices (GGPs).

DATES: Submit written or electronic comments on this guidance at any time. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies on a 3.5″ diskette of the guidance document entitled ''Class II Special Controls Guidance Document: RNA Preanalytical Systems (RNA Collection, Stabilization and Purification Systems for RT–PCR used in Molecular Diagnostic Testing)'' to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ–220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–443–8818. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Uwe Scherf, Center for Devices and Radiological Health (HFZ–440), Food and Drug Administration, 2098 Gaither Rd., Rockville, MD 20850, 240–276–0496.

SUPPLEMENTARY INFORMATION:

I. Background

Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule classifying RNA preanalytical systems into class II (special controls) under

section 513(f)(2) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360c(f)(2)). This guidance document will serve as the special control for RNA preanalytical systems.

Section 513(f)(2) of the act provides that any person who submits a premarket notification under section 510(k) of the act (21 U.S.C. 360(k)) for a device that has not previously been classified may, within 30 days after receiving an order classifying the device in class III under section 513(f)(1) of the act, request FDA to classify the device under the criteria set forth in section 513(a)(1) of the act. FDA shall, within 60 days of receiving such a request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the **Federal Register** announcing such classification. Because of the timeframes established by section 513(f)(2) of the act, FDA has determined, under § 10.115(g)(2) (21 CFR 10.115(g)(2)), that it is not feasible to allow for public participation before issuing this guidance as a final guidance document. Therefore, FDA is issuing this guidance document as a level 1 guidance document that is immediately in effect. FDA will consider any comments that are received in response to this notice to determine whether to amend the guidance document.

II. Significance of Guidance

This guidance is being issued consistent with FDA's GGP regulation (21 CFR 10.115). The guidance represents the agency's current thinking on RNA preanalytical systems. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

To receive ''Class II Special Controls Guidance Document: RNA Preanalytical Systems (RNA Collection, Stabilization and Purification Systems for RT–PCR used in Molecular Diagnostic Testing)'' by fax call the Center for Devices and Radiological Health (CDRH) Facts-On-Demand system at 800–899–0381 or 301–827–0111 from a touch-tone telephone. Press 1 to enter the system. At the second voice prompt, press 1 to order a document. Enter the document number (1563) followed by the pound sign (#). Follow the remaining voice prompts to complete your request.

To receive ''Class II Special Controls Guidance Document: RNA Preanalytical Systems (RNA Collection, Stabilization and Purification Systems for RT–PCR used in Molecular Diagnostic Testing),'' you may either send a fax request to 301–443–8818 to receive a hard copy of the document, or send an e-mail request to *gwa@cdrh.fda.gov* to receive a hard copy or an electronic copy. Please use the document number (1563) to identify the guidance you are requesting.

Persons interested in obtaining a copy of the guidance may also do so by using the Internet. CDRH maintains an entry on the Internet for easy access to information, including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturer's assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. The CDRH Web site may be accessed at *http://www.fda.gov/cdrh*. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/cdrh/guidance.html*. Guidance documents are also available on the Division of Dockets Management Internet site at *http://www.fda.gov/ohrms/dockets*.

IV. Paperwork Reduction Act of 1995

This guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520). The collections of information addressed in the guidance document have been approved by OMB in accordance with the PRA under the regulations governing premarket notification submissions (21 CFR part 807, subpart E, OMB control number 0910–0120). The labeling provisions addressed in the guidance have been approved by OMB under OMB control number 0910–0485.

V. Comments

Interested persons may submit written or electronic comments regarding this document to the Division of Dockets Management (see **ADDRESSES**). Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: August 9, 2005.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 05–16913 Filed 8–24–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Research and Demonstration Projects for Indian Health

AGENCY: Indian Health Service, HHS.

ACTION: Notice of single source cooperative agreement with the National Council of Urban Indian Health.

SUMMARY: The Indian Health Service (IHS) announces the award of a cooperative agreement to the National Council of Urban Indian Health (NCUIH) for demonstration project for urban Indian health care education, consultation, health care data dissemination, training, and technical assistance to determine the unmet health care needs of urban Indians and to assist the Secretary in assessing the health status and health care of urban Indians. The project is for a three year project period effective September 1, 2005 to August 31, 2008. Annual funding for the project is $417,000.

The award is issued under the authority of the Public Health Service Act, Section 301 and the Indian Health Care Improvement Act, Public Law 94–437, Sections 503, 504, and 511, and is listed under Catalog of Federal Domestic Assistance number 93–933.

The specific objectives of the project are:

1. NCUIH will keep the Urban Indian health programs and the IHS informed of items of interest pertaining to the health status and unmet needs of urban Indians and the federal budget process by reviewing activities that have taken place in regard to Indian health care.

2. To disseminate information relative to Title V, local Urban Indian health issues, training opportunities, research instruments, data, budget, NCUIH activities and various forms of technical assistance to the Urban Indian health programs, keeping IHS informed of activities taking place.

3. To disseminate information and respond to all inquiries relative to Title V, local Urban Indian health issues, training opportunities, research instruments, data, budget, NCUIH

activities and will issue a quarterly newsletter and develop a web page.

4. To coordinate meetings for the Urban Indian health programs to provide training, technical assistance, and/or updated information addressing the health care needs of Urban Indians.

Reporting Requirements:

1. Monthly Activity Report: The organization will provide to the IHS program office a monthly report detailing activities performed for the organization. These activity reports will include:

- Trip reports for travel in connection to the organization
- Information on meetings attended by NCUIH regarding Indian health care education activities, and any documentation provided by NCUIH at these meetings
- Information relative to health status and health care needs of urban Indians in urban centers

2. Program Progress Report: Program progress reports are required semi-annually. These reports will include brief comparison of actual accomplishments to the goals established for the period, reasons for slippage (if applicable), and other pertinent information as required. A final report is to be submitted within 90 days of expiration of the budget/project period.

3. Financial Status Report: Financial status reports are required semi-annually. Standard Form 269 (long form) will be used for financial reporting. A final report must be submitted within 90 days of expiration of the budget/project period.

4. Financial Audit: A financial audit, conducted by an independent auditor will be completed annually for each year within the project period (three).

Failure to submit required reports within the time allowed may result in suspension or termination of the active cooperative agreement, withholding of payments or converting to the reimbursement method of payment. Continued failure to submit required reports may result in the imposition of special award provisions, or cause other eligible projects or activities involving the grantee organization not to be funded.

Justification for Single Source: This project has been awarded on a non-competitive single source basis. NCUIH is the only nationwide Indian organization that is specifically established to address the health needs of American Indians and Alaska Natives living in urban areas with membership consisting of Urban Indian health organizations funded under Title V of the Indian Health Care Improvement Act, Public Law 93–437, as amended, and under authority 25 U.S.C. 1652. Furthermore, it is the only nationwide organization for urban American Indians and Alaska Natives supporting the growth of the Urban Indian health care delivery system.

Use of Cooperative Agreement: A cooperative agreement has been awarded because of anticipated substantial Programmatic involvement by IHS staff in the project. Substantial programmatic involvement is as follows:

1. IHS staff will participate in the Board of Director meetings. Purposes will be to present the IHS prospectus on current health care issues affecting the Urban Indian people and allow IHS the opportunity to hear the continuing unmet needs of Urban Indians.

2. IHS staff may, at the request of NCUIH, participate on study groups and may recommend topics for consideration.

3. IHS will be involved in the selection and approval process for hiring key personnel. Key personnel are the Executive Director, the Office Administrator, and may include the hiring of major consultants. NCUIH must submit the Executive Director and Office Administrator selection criteria to IHS for approval when there becomes a change in staffing.;

4. IHS will be involved in meetings held by NCUIH.

Contacts: For program information, contact Ms. Danielle Steward, Program Specialist, Office of Urban Indian Health Programs, Office of the Director, Indian Health Service, Reyes Building, 801 Thompson Avenue, Rockville, MD, 20852, (301) 443–4680. For grants management information, contact Lois Hodge, Grants Management Officer, Division of Grants Operations, Reyes Building, 801 Thompson Avenue, Rockville, MD, 20852, (301) 443–5204.

Dated: August 19, 2005.

Mary Lou Stanton,

Deputy Director for Indian Health Policy Indian Health Service.

[FR Doc. 05–16912 Filed 8–24–05; 8:45 am]

BILLING CODE 4156–16–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Privacy Act of 1974; Report of Modified or Altered System

AGENCY: Indian Health Service (IHS), HHS.

ACTION: Notice of proposed modification or Alteration to a System of Records (SOR).

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, we are proposing to modify or alter an SOR, ''Health, Medical and Billing Records (formerly known as the Health and Medical Records Systems),'' System No. 09–17–0001. We propose to include contract health service records, as an additional category of individuals covered by the system, which consists of medical records to eligible American Indians and Alaska Native (AI/AN) people that supplements the health care resources available with the purchase of medical care and services that are not available within the IHS direct care system which may include, but not limited to, basic and specialty health care services from local and community health care providers, including hospital care, physician services, outpatient care, laboratory, dental, radiology, pharmacy, and transportation services. Under the Purpose of the system, we propose to include several new purposes that are in line with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule provisions which were incorporated into the published IHS Notice of Privacy Practices (NPP) and to include debt collection activities. We are proposing to modify/alter/delete several published routine uses, as explained, to accommodate for program and statutory changes as indicated: Number 1 is modified/altered by separating the medical treatment, payment and health care operations into two separate routine uses 1 and 2 to include payment, billing, third-party reimbursement and debt collection activities; numbers 3, 4 and 11 are to include business associate agreement language to comply with HIPAA Privacy standards and renumbered as 5, 6 and 12 respectively; number 5 is to include a special requirement notice for sensitive protected health information (PHI) such as alcohol/drug abuse, HIV/AIDS, STD or mental health patient information and renumbered as 7; number 6 is to reflect changes in research disclosures to comply with HIPAA Privacy standards and renumbered as 8; number 7 is to include various cases of abuses, neglect, sexual assault and domestic violence and emphasis on meeting the requirements of 42 CFR part 2 and renumbered as 9; number 8 is to clarify the disclosures regarding suspected cases of child abuse and renumbered as 10; number 9 is modified to include legal proceedings related to administrative claims and the inclusive provision of the Department of Health and Human Services (DHHS)/Office of General Counsel (OGC)

representation in litigation matters and renumbered as 11; number 10 is modified to include business associate agreement language to comply with HIPAA Privacy standards and is renumbered as 5; numbers 12 and 16 are modified and incorporated into one proposed routine use 13 with minor edits; number 14 is modified to reflect the permitted use/disclosure requirements of 45 CFR 164.502(g) and remains as 14; number 15 is modified with some minor edits to reflect current changes to enable efficient administration of health care operations and planning and delivery of patient medical care and renumbered as 18; and number 16 is being deleted and incorporated into the proposed routine use 13.

We propose to add 10 new routine uses to provide disclosures of records when all requirements are met: number 2, to provide disclosure for third-part reimbursement, fiscal intermediary functions and debt collection activities; number 3, to provide disclosures to state Medicaid agencies or other entities acting pursuant to a contract with Centers for Medicare & Medicaid Services (CMS) for fraud and abuse control efforts to the extent required by law or under an agreement between IHS and respective state Medicaid agency or other entities; number 16, to an individual having authority to act on behalf of an incompetent individual concerning health care decisions to the extent permitted under 45 CFR 164.502(g); number 17, information may be used or disclosed from an IHS facility directory unless the individual objects to the disclosure and may provide the religious affiliation only to members of the clergy; number 18, information may be disclosed to a relative, a close personal friend, or any other person identified by the individual that is directly relevant to that person's involvement with their care or payment for health care and may be used or disclosed to notify family member, personal representative, or other person responsible for the individual's care, of their location, general condition or death; number 20, to provide records to Federal and non-Federal protection and advocacy organizations for investigating incidents of abuse and neglect of individuals with development disabilities as defined in 42 U.S.C. 10801–10805(a)(4) and 42 CFR 51.41–46 to the extent authorized by law and the conditions of 45 CFR 1386.22(a)(2) are met; number 21, disclosure to a correctional institution or a law enforcement official, during the period of time the individual is either an inmate or is otherwise in lawful custody, for the provision of health care to the individual or for health and safety purposes; number 22, disclosure to the Social Security Administration (SSA) for validation of Social Security Number(s) (SSNs) purposes only; number 23, disclosure of relevant health care information may be made to funeral director or representatives of funeral homes to allow for necessary arrangements; number 24, disclosure to a public or private covered entity that is authorized by law or charter to assist in disaster relief efforts. Routine use previously numbered 13 is deleted as being no longer applicable to the system. Routine uses previously numbered 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, and 15 have been renumbered as 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 19 respectively.

The security classification previously reported as ''None'' will remain. We have modified the language in the routine uses to provide clarification to IHS' intention to disclose individual-specific information contained in this system. The routine uses will then be prioritized and reordered according to their usage. We will also take the opportunity to update any sections of the system notice to provide clarity on the changing environment to include for digital records and the initiative of transitioning from a paper-based record to a computerized-based or electronic medical record.

DATES: *Effective Dates:* The Report of Intent to Amend a System of Records Notice and an advance copy of the system notice have been sent to the Chair of the House Committee on Government Reform and Oversight, the Chair of the Senate Committee on Governmental Affairs, and the Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB). To ensure that all parties have adequate time in which to comment, the modified system of records, including routine uses, will become effective 40 days from the publication of the notice, or from the date it was submitted to OMB and the Congress, whichever is later, unless IHS receives comments that require alterations to this notice.

ADDRESSES: The public should address comments to: Mr. William Tibbitts, IHS Privacy Act Officer, Division of Regulatory, Records Access and Policy Liaison, 801 Thompson Avenue, TMP 450, Rockville, MD 20852–1627; call non-toll free (301) 443–1116; send via facsimile to (301) 443–2316, or send your e-mail requests, comments, and return address to: *wtibbitt@hqe.ihs.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Patricia Gowan, IHS Lead Health Information Management (HIM) Consultant, Office of Clinical and Preventative Services, Reyes Building, 801 Thompson Avenue, Suite 314, Rockville, MD 20852–1627, Telephone (301) 443–2522.

SUPPLEMENTARY INFORMATION:

A. Major Alteration of 09–17–0001, ''Indian Health Service Health and Medical Records Systems, HHS/IHS/OHP'': IHS provides care and treatment to patients at IHS health care facilities and under contract. Whenever possible, IHS seeks reimbursement through third-party payers such as Medicare, Medicaid, and private insurers. IHS is proposing to alter the existing system of records as follows:

1. IHS is changing the title of the system from ''Health and Medical Records System, HHS/IHS/OHP,'' to ''Medical, Health, and Billing Records System, HHS/IHS/OCPS,'' to clarify that IHS also uses the records in the system to process, document, and monitor third-party payment billing and reimbursement claims, in addition to debt collection activities.

2. IHS is proposing to include contract health service records as an additional category of individuals covered by the system.

3. IHS is proposing to include several new purposes that are in line with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule provisions. These seven (7) new purposes are as follow: (1) To provide information to organ procurement organizations or other entities engaged in the procurement, banking, or transplantation of organs to facilitate organ, eye, or tissue donation and transplant. (2) To provide information to individuals about treatment alternatives or other types of health-related benefits and services. (3) To provide information to the Food and Drug Administration (FDA) in connection with an FDA-regulated product or activity. (4) To provide information to correctional institutions as necessary for health and safety purposes. (5) To provide information to governmental authorities (*e.g.,* social service or protective services agencies) on victims of abuse, neglect, sexual assault or domestic violence. (6) To provide information to the National Archives and Records Administration in records management inspections conducted under the authority of 44 U.S.C. 2901 *et seq.* (7) To provide relevant health care information to funeral directors or representatives of funeral homes to allow necessary arrangements prior to and in

anticipation of an individual's impending death.

4. IHS is proposing to modify/alter/delete several published routine uses and to include ten (10) new routine uses when all requirements have been met. IHS is modifying/altering routine use #1 by separating the medical treatment, payment, and health care operations to routine uses #1 and #2 respectively; routine uses #2 is renumbered as #4; routine uses #3 and #4 are modified to include business associate agreement language to comply with HIPAA Privacy standards and renumbered as #6 and #7 respectively; routine use #5 is altered to include a special requirement notice for sensitive protected health information (PHI) as such alcohol/drug abuse, HIV/AIDS, STD or mental health patient information and renumbered as #8; routine use #6 is modified/altered to reflect changes in research disclosures to comply with HIPAA Privacy standards and renumbered as #9; routine use #7 is modified/altered to include various cases of abuses, neglect, sexual assault and domestic violence with an emphasis on 42 CFR part 2 and renumbered as #10; routine use #8 is modified to clarify the disclosure under (a) and (b) with no statutory language change on child abuse and the deletion of statutory citation of 42 CFR Part 2 and renumbered as #11; routine use #9 is modified to include legal proceedings related to administrative claims and the inclusive provision of the DHHS/Office of General Counsel (OGC) representation in litigation matters and renumbered as #12; routine use #10 was modified/altered to reflect statutory requirement and renumbered as #5; routine use #11 is modified to include business associate agreement language to comply with the HIPAA Privacy standards and altered to eliminate the safeguard requirements of the Privacy Act and was renumbered as #13; routine uses #12 and #16 were modified and incorporated into one proposed routine use disclosure with minor edits and to efficiently administer health care operations and to assist in the planning and delivery of patient's medical care and renumbered as #14; routine use #13 was deleted as no longer applicable to the purpose and function of IHS; routine use #14 is modified to reflect the permitted use/disclosure requirement of 45 CFR 164.502(g) citation and renumbered as #15; routine use #15 is modified with some minor edits to reflect current changes and remains as #15; and routine use #16 is being deleted and incorporated into the new routine use #13.

IHS is proposing to add ten (10) new routine uses as follows: routine use #2 is to provide disclosure for third-party reimbursement, fiscal intermediary functions, and debt collection activities; routine use #3 is to provide state agencies or other entities acting pursuant to a contract with CMS for fraud and abuse control efforts to the extent required by law or under an agreement between IHS and respective state Medicaid agency or other entities; routine use #16 is to provide an individual having authority to act on behalf of an incompetent individual concerning health care decisions to the extent permitted under 45 CFR 164.502(g); routine use #17 is that certain protected health information may be used or disclosed from an IHS facility directory unless the individual objects to the disclosure and IHS may provide the religious affiliation only to members of the clergy to the extent permitted under 45 CFR 164.510; routine use #18 is that relevant protected health information may be disclosed to a relative, a close personal friend, or any other person identified by the individual with their care or payment for health care. Information may be used or disclosed to notify family members, personal representative, or other person responsible for the individual's care, of their location, general condition or death; routine use #20 to Federal and non-Federal protection and advocacy organization for purpose of investigating incidents of abuse and neglect of individuals with development disabilities as defined in 42 U.S.C. 10801–10805(a)(4) and 42 CFR 51.41–46 to the extent authorized by law and the conditions of 45 CFR 1386.22(a)(2) are met; routine use #21 is for disclosure to a correctional institution or a law enforcement official, during the period of time the individual is either an inmate or is otherwise in lawful custody, for the provision of health care to the individual or for health and safety purposes; routine use #22 is for disclosure to the Social Security Administration for validation of SSN(s) purposes only; routine use #23 is that disclosure of relevant health care information may be made to funeral director or representatives of funeral homes to allow for necessary arrangements; and routine use #24 is for disclosure to a public or private covered entity that is authorized by law or charter to assist in disaster relief efforts.

In addition to updating and making editorial corrections to improve the clarity of the system notice, this alteration requires the updating of the system manager listing, and revisions of the Categories of Records, Purposes, Authority, Safeguard, Retention and Disposal, Notification and Access Procedures sections.

Dated: August 15, 2005.

Charles W. Grim,

Assistant Surgeon General, Director, Indian Health Service.

09–17–0001

SYSTEM NAME:

Medical, Health, and Billing Records Systems, HHS/IHS/OCPS.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Indian Health Service (IHS) hospitals, health centers, school health centers, health stations, field clinics, Service Units, IHS Area Offices (Appendix 1), and Federal Archives and Records Centers (Appendix 2). Automated, electronic and computerized records, including Patient Care Component (PCC) records, are stored at the Information Technology Support Center (ITSC), IHS, located in Albuquerque, New Mexico (Appendix 1). Records may also be located at contractor sites. A current list of contractor sites is available by writing to the appropriate System Manager (Area or Service Unit Director/Chief Executive Officer) at the address shown in Appendix 1.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals, including both IHS beneficiaries and non-beneficiaries, who are examined/treated on an inpatient and/or outpatient basis by IHS staff and/or contract health care providers (including tribal contractors).

CATEGORIES OF RECORDS IN THE SYSTEM:

Note: Records relating to claims by and against the Department of Health and Human Services (DHHS) are maintained in the Administrative Claims System, 09–90–0062, HHS/OS/OGC. Such claims include those arising under the Federal Torts Claims Act, Military Personnel and Civilian Employees Claims Act, Federal Claims Collection Act, Federal Medical Care Recovery Act, and Act for Waiver of Overpayment of Pay.

1. Health and medical records containing examination, diagnostic and treatment data, proof of IHS eligibility, social data (such as name, address, date of birth, Social Security Number (SSN), tribe), laboratory test results, and dental, social service, domestic violence, sexual abuse and/or assault, mental health, and nursing information.

2. Follow-up registers of individuals with a specific health condition or a particular health status such as cancer, diabetes, communicable diseases,

suspected and confirmed abuse and neglect, immunizations, suicidal behavior, or disabilities.

3. Logs of individuals provided health care by staff of specific hospital or clinic departments such as surgery, emergency, obstetric delivery, medical imaging, and laboratory.

4. Surgery and/or disease indices for individual facilities that list each relevant individual by the surgery or disease.

5. Monitoring strips and tapes such as fetal monitoring strips and EEG and EKG tapes.

6. Third-party reimbursement and billing records containing name, address, date of birth, dates of service, third party insurer claim numbers, SSN, health plan name, insurance number, employment status, and other relevant claim information necessary to process and validate third-party reimbursement claims.

7. Contract Health Service (CHS) records containing name, address, date of birth, dates of care, Medicare or Medicaid claim numbers, SSN, health plan name, insurance number, employment status, and other relevant claim information necessary to determine CHS eligibility and to process CHS claims.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Departmental Regulations (5 U.S.C. 301); Privacy Act of 1974 (5 U.S.C. 552a); Federal Records Act (44 U.S.C. 2901); Section 321 of the Public Health Service Act, as amended (42 U.S.C. 248); Section 327A of the Public Health Service Act, as amended (42 U.S.C. 254a); Snyder Act (25 U.S.C. 13); Indian Health Care Improvement Act (25 U.S.C. 1601 *et seq.*); and the Transfer Act of 1954 (42 U.S.C. 2001–2004).

PURPOSES:

The purposes of this system are:

1. To provide a description of an individual's diagnosis, treatment and outcome, and to plan for immediate and future care of the individual.

2. To provide statistical data to IHS officials in order to evaluate health care programs and to plan for future needs.

3. To serve as a means of communication among members of the health care team who contribute to the individual's care; *e.g.*, to integrate information from field visits with records of treatment in IHS facilities and with non-IHS health care providers.

4. To serve as the official documentation of an individual's health care.

5. To contribute to continuing education of IHS staff to improve the delivery of health care services.

6. For disease surveillance purposes. For example:

(a) The Centers for Disease Control and Prevention may use these records to monitor various communicable diseases;

(b) The National Institutes of Health may use these records to review the prevalence of particular diseases (*e.g.*, malignant neoplasms, diabetes mellitus, arthritis, metabolism, and digestive diseases) for various ethnic groups of the United States; or

(c) Those public health authorities that are authorized by law may use these records to collect or receive such information for purposes of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death and the conduct of public health surveillance, investigations, and interventions.

7. To compile and provide aggregated program statistics. Upon request of other components of DHHS, IHS will provide statistical information, from which individual/personal identifiers have been removed, such as:

(a) To the National Committee on Vital and Health Statistics for its dissemination of aggregated health statistics on various ethnic groups;

(b) To the Assistant Secretary for Planning and Evaluation, Health Policy to keep a record of the number of sterilizations provided by Federal funding;

(c) To the Centers for Medicare & Medicaid Services (CMS) to document IHS health care covered by the Medicare and Medicaid programs for third-party reimbursement; or

(d) To the Office of Clinical Standards and Quality, CMS to determine the prevalence of end-stage renal disease among the American Indian and Alaska Native (AI/AN) population and to coordinate individual care.

8. To process and collect third-party claims and facilitate fiscal intermediary functions and to process debt collection activities.

9. To improve the IHS national patient care database by means of obtaining and verifying an individual's SSN with the Social Security Administration (SSA).

10. To provide information to organ procurement organizations or other entities engaged in the procurement, banking, or transplantation of organs to facilitate organ, eye, or tissue donation and transplant.

11. To provide information to individuals about treatment alternatives or other types of health-related benefits and services.

12. To provide information to the Food and Drug Administration (FDA) in connection with an FDA-regulated product or activity.

13. To provide information to correctional institutions as necessary for health and safety purposes.

14. To provide information to governmental authorities (*e.g.*, social services or protective services agencies) on victims of abuse, neglect, sexual assault or domestic violence.

15. To provide information to the National Archives and Records Administration in records management inspections conducted under the authority of 44 U.S.C 2901 *et seq.*

16. To provide relevant health care information to funeral directors or representatives of funeral homes to allow necessary arrangements prior to and in anticipation of an individual's impending death.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

This system of records contains individually identifiable health information. The DHHS Privacy Act Regulations (45 CFR Part 5b) and the Privacy Rule (45 CFR Parts 160 and 164) issued pursuant to the Health Insurance Portability and Accountability Act (HIPAA) of 1996 apply to most health information maintained by IHS. Those regulations may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice. An accounting of all disclosures of a record made pursuant to the following routine uses will be made and maintained by IHS for five years or for the life of the records, whichever is longer.

Note: Special requirements for alcohol and drug abuse patients: If an individual receives treatment or a referral for treatment for alcohol or drug abuse, then the Confidentiality of Alcohol and Drug Abuse Patient Records Regulations, 42 CFR Part 2 may apply. In general, under these regulations, the only disclosures of the alcohol or drug abuse record that may be made without patient consent are: (1) To meet medical emergencies (42 CFR 2.51), (2) for research, audit, evaluation and examination (42 CFR 2.52 and 2.53), (3) pursuant to a court order (42 CFR 2.61–2.67), and (4) pursuant to a qualified service organization agreement, as defined in 42 CFR 2.11. In all other situations, written consent of the individual is usually required prior to disclosure of alcohol or drug abuse information under the routine uses listed below.

1. Records may be disclosed to Federal and non-Federal (public or

private) health care providers that provide health care services to IHS individuals for purposes of planning for or providing such services, or reporting results of medical examination and treatment.

2. Records may be disclosed to Federal, state, local or other authorized organizations that provide third-party reimbursement or fiscal intermediary functions for the purposes of billing or collecting third-party reimbursements. Relevant records may be disclosed to debt collection agencies under a business associate agreement arrangement directly or through a third party.

3. Records may be disclosed to state agencies or other entities acting pursuant to a contract with CMS, for fraud and abuse control efforts, to the extent required by law or under an agreement between IHS and respective state Medicaid agency or other entities.

4. Records may be disclosed to school health care programs that serve AI/AN for the purpose of student health maintenance.

5. Records may be disclosed to the Bureau of Indian Affairs (BIA) or its contractors under an agreement between IHS and the BIA relating to disabled AI/AN children for the purposes of carrying out its functions under the Individuals with Disabilities Education Act (IDEAS), 20 U.S.C.1400, *et seq.*

6. Records may be disclosed to organizations deemed qualified by the Secretary of DHHS and under a business associate agreement to carry out quality assessment/improvement, medical audits, utilization review or to provide accreditation or certification of health care facilities or programs.

7. Records may be disclosed under a business associate agreement to individuals or authorized organizations sponsored by IHS, such as the National Indian Women's Resource Center, to conduct analytical and evaluation studies.

8. Disclosure may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual. An authorization, Form IHS 810, is required for the disclosure of sensitive protected health information (PHI) (*e.g.*, alcohol/drug abuse patient information, human immunodeficiency virus (HIV)/AIDS, STD, or mental health) that is maintained in the medical record.

9. Records may be disclosed for research purposes to the extent permitted by:

(a) Determining that the use(s) or disclosure(s) are met under 45 CFR 164.512(i), or

(b) Determining that the use(s) or disclosure(s) are met under 45 CFR 164.514(a) through (c) for de-identified PHI, and 5 U.S.C. 552a(b)(5), or

(c) Determining that the requirements of 45 CFR 164.514(e) for limited data sets, and 5 U.S.C. 552a(b)(5) are met.

10. Information from records, such as information concerning the commission of crimes, suspected cases of abuse (including child, elder and sexual abuse), neglect, sexual assault or domestic violence, births, deaths, alcohol or drug abuse, immunizations, cancer, or the occurrence of communicable diseases, may be disclosed to public health authorities or other appropriate government authorities, as authorized by Federal, state, Tribal or local law or regulation of the jurisdiction in which the facility is located.

Note: In Federally conducted or assisted alcohol or drug abuse programs, under 42 CFR Part 2, disclosure of patient information for purposes of criminal investigations must be authorized by court order issued under 42 CFR Part 2.65, except that reports of suspected child abuse may be made to the appropriate state or local authorities under state law.

11. Information may be disclosed from these records regarding suspected cases of child abuse to:

(a) Federal, state or Tribal agencies that need to know the information in the performance of their duties, and

(b) Members of community child protection teams for the purposes of investigating reports of suspected child abuse, establishing a diagnosis, formulating or monitoring a treatment plan, and making recommendations to the appropriate court. Community child protection teams are comprised of representatives of Tribes, the Bureau of Indian Affairs, child protection service agencies, the judicial system, law enforcement agencies and IHS.

12. IHS may disclose information from these records in litigations and/or proceedings related to an administrative claim when:

(a) IHS has determined that the use of such records is relevant and necessary to the litigation and/or proceedings related to an administrative claim and would help in the effective representation of the affected party listed in subsections (i) through (iv) below, and that such disclosure is compatible with the purpose for which the records were collected. Such disclosure may be made to the DHHS/Office of General Counsel (OGC) and/or Department of Justice (DOJ), pursuant to an agreement between IHS and OGC, when any of the following is a party to litigation and/or proceedings related to an administrative claim or has an interest in the litigation and/or proceedings related to an administrative claim:

(i) DHHS or any component thereof; or

(ii) Any DHHS employee in his or her official capacity; or

(iii) Any DHHS employee in his or her individual capacity where the DOJ (or DHHS, where it is authorized to do so) has agreed to represent the employee; or

(iv) The United States or any agency thereof (other than DHHS) where DHHS/OGC has determined that the litigation and/or proceedings related to an administrative claim is likely to affect DHHS or any of its components.

(b) In the litigation and/or proceedings related to an administrative claim described in subsection (a) above, information from these records may be disclosed to a court or other tribunal, or to another party before such tribunal in response to an order of a court or administrative tribunal, provided that the covered entity discloses only the information expressly authorized by such order.

13. Records may be disclosed under a business associate agreement to an IHS contractor for the purpose of computerized data entry, medical transcription, duplication services, or maintenance of records contained in this system.

14. Records may be disclosed under a personal services contract or other agreement to student volunteers, individuals working for IHS, and other individuals performing functions for IHS who do not technically have the status of agency employees, if they need the records in the performance of their agency functions.

15. Records regarding specific medical services provided to an unemancipated minor individual may be disclosed to the unemancipated minor's parent or legal guardian who previously consented to those specific medical services, to the extent permitted under 45 CFR 164.502(g).

16. Records may be disclosed to an individual having authority to act on behalf of an incompetent individual concerning health care decisions, to the extent permitted under 45 CFR 164.502(g).

17. Information may be used or disclosed from an IHS facility directory in response to an inquiry about a named individual from a member of the general public to establish the individual's presence (and location when needed for visitation purposes) or to report the individual's condition while hospitalized (*e.g.*, satisfactory or stable),

unless the individual objects to disclosure of this information. IHS may provide the religious affiliation only to members of the clergy.

18. Information may be disclosed to a relative, a close personal friend, or any other person identified by the individual that is directly relevant to that person's involvement with the individual's care or payment for health care.

Information may also be used or disclosed in order to notify a family member, personal representative, or other person responsible for the individual's care, of the individual's location, general condition or death.

If the individual is present for, or otherwise available prior to, a use or disclosure, and is competent to make health care decisions;

(a) May use or disclose after the facility obtains the individual's consent,

(b) Provides the individual with the opportunity to object and the individual does not object, or

(c) It could reasonably infer, based on professional judgment, that the individual does not object.

If the individual is not present, or the opportunity to agree or object cannot practicably be provided due to incapacity or emergent circumstances, an IHS health care provider may determine, based on professional judgment, whether disclosure is in the individual's best interest, and if so, may disclose only what is directly relevant to the individual's health care.

19. Information concerning exposure to the HIV may be disclosed, to the extent authorized by Federal, state or Tribal law, to the sexual and/or needle-sharing partner(s) of a subject individual who is infected with HIV under the following circumstances:

(a) The information has been obtained in the course of clinical activities at IHS facilities;

(b) IHS has made reasonable efforts to counsel and encourage the subject individual to provide information to the individual's sexual or needle-sharing partner(s);

(c) IHS determines that the subject individual is unlikely to provide the information to the sexual or needle-sharing partner(s) or that the provision of such information cannot reasonably be verified; and

(d) The notification of the partner(s) is made, whenever possible, by the subject individual's physician or by a professional counselor and shall follow standard counseling practices.

(e) IHS has advised the partner(s) to whom information is disclosed that they shall not re-disclose or use such information for a purpose other than that for which the disclosure was made.

20. Records may be disclosed to Federal and non-Federal protection and advocacy organizations that serve AI/AN for the purpose of investigating incidents of abuse and neglect of individuals with developmental disabilities (including mental disabilities), as defined in 42 U.S.C. §§ 10801–10805(a)(4) and 42 CFR §§ 51.41–46, to the extent that such disclosure is authorized by law and the conditions of 45 CFR § 1386.22(a)(2) are met.

21. Records of an individual may be disclosed to a correctional institution or a law enforcement official, during the period of time the individual is either an inmate or is otherwise in lawful custody, for the provision of health care to the individual or for health and safety purposes. Disclosure may be made upon the representation of either the institution or a law enforcement official that disclosure is necessary for the provision of health care to the individual, for the health and safety of the individual and others (*e.g.*, other inmates, employees of the correctional facility, transport officers), and for facility administration and operations. This routine use applies only for as long as the individual remains in lawful custody, and does not apply once the individual is released on parole or placed on either probation or on supervised release, or is otherwise no longer in lawful custody.

22. Records including patient name, date of birth, SSN, gender and other identifying information may be disclosed to the SSA as is reasonably necessary for the purpose of conducting an electronic validation of the SSN(s) maintained in the record to the extent required under an agreement between IHS and SSA.

23. Disclosure of relevant health care information may be made to funeral directors or representatives of funeral homes in order to allow them to make necessary arrangements prior to and in anticipation of an individual's impending death.

24. Records may be disclosed to a public or private covered entity that is authorized by law or charter to assist in disaster relief efforts (*e.g.*, the Red Cross and the Federal Emergency Management Administration), for purposes of coordinating information with other similar entities concerning an individual's health care, payment for health care, notification of the individual's whereabouts and his or her health status or death.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

File folders, ledgers, card files, microfiche, microfilm, computer tapes, disk packs, digital photo discs, and automated, computer-based or electronic files.

RETRIEVABILITY:

Indexed by name, record number, and SSN and cross-indexed.

SAFEGUARDS:

Safeguards apply to records stored on-site and off-site.

1. Authorized Users: Access is limited to authorized IHS personnel, volunteers, IHS contractors, subcontractors, and other business associates in the performance of their duties. Examples of authorized personnel include: Medical records personnel, business office personnel, contract health staff, health care providers, authorized researchers, medical audit personnel, health care team members, and legal and administrative personnel on a need to know basis.

2. Physical Safeguards: Records are kept in locked metal filing cabinets or in a secured room or in other monitored areas accessible to authorized users at all times when not actually in use during working hours and at all times during non-working hours. Magnetic tapes, disks, other computer equipment (*e.g.*, pc workstations) and other forms of personal data are stored in areas where fire and life safety codes are strictly enforced. Telecommunication equipment (*e.g.*, computer terminal, servers, modems and disks) of the Resource and Patient Management System (RPMS) are maintained in locked rooms during non-working hours. Network (Internet or Intranet) access of authorized individual(s) to various automated and/or electronic programs or computers (*e.g.*, desktop, laptop, handheld or other computer types) containing protected personal identifiers or personal health information (PHI) is reviewed periodically and controlled for authorizations, accessibility levels, expirations or denials, including passwords, encryptions or other devices to gain access. Combinations and/or electronic passcards on door locks are changed periodically and whenever an IHS employee resigns, retires or is reassigned.

3. Procedural Safeguards: Within each facility a list of personnel or categories of personnel having a demonstrable need for the records in the performance of their duties has been developed and

is maintained. Procedures have been developed and implemented to review one-time requests for disclosure to personnel who may not be on the authorized user list. Proper charge-out procedures are followed for the removal of all records from the area in which they are maintained. Records may not be removed from the facility except in certain circumstances, such as compliance with a valid court order or shipment to the Federal Records Center(s). Persons who have a need to know are entrusted with records from this system of records and are instructed to safeguard the confidentiality of these records. These individuals are to make no further disclosure of the records except as authorized by the system manager and permitted by the Privacy Act and the HIPAA Privacy Rule as adopted, and to destroy all copies or to return such records when the need to know has expired. Procedural instructions include the statutory penalties for noncompliance.

The following automated information systems (AIS) security procedural safeguards are in place for automated health and medical records maintained in the RPMS. A profile of automated systems security is maintained. Security clearance procedures for screening individuals, both Government and contractor personnel, prior to their participation in the design, operation, use or maintenance of IHS AIS are implemented. The use of current passwords and log-on codes are required to protect sensitive automated data from unauthorized access. Such passwords and codes are changed periodically. An automated or electronic audit trail is maintained and reviewed periodically. Only authorized IHS Division of Information Resources staff may modify automated files in batch mode. Personnel at remote terminal sites may only retrieve automated or electronic data. Such retrievals are password protected. Privacy Act requirements, HIPAA Privacy Rule and Security requirements and specified AIS security provisions are specifically included in contracts and agreements and the system manager or his/her designee oversee compliance with these contract requirements.

4. Implementing Guidelines: DHHS Chapter 45–10 and supplementary Chapter PHS.hf: 45–10 of the General Administration Manual; DHHS, ''Automated Information Systems Security Program Handbook,'' as amended; DHHS IRM Policy HHS–IRM–2000–0005, ''IRM Policy for IT Security for Remote Access'; OMB Circular A–130 ''Management of Federal Information Resources'; HIPAA Security Standards for the Protection of Electronic Protected Health Information, 45 CFR §§ 164.302 through 164.318; and E-Government Act of 2002 (Pub. L. 107–347, 44 U.S.C. Ch 36).

RETENTION AND DISPOSAL:

Patient listings which may identify individuals are maintained in IHS Area and Program Offices permanently. Inactive records are held at the facility that provided health and billing services from three to seven years and then are transferred to the appropriate Federal Records Center. Monitoring strips and tapes (*e.g.*, fetal monitoring strips, EEG and EKG tapes) that are not stored in the individual's official medical record are stored at the health facility for one year and are then transferred to the appropriate Federal Records Center. (See Appendix 2 for Federal Records Center addresses.) In accordance with the records disposition authority approved by the Archivist of the United States, paper records are maintained for 75 years after the last episode of individual care except for billing records. The retention and disposal methods for billing records will be in accordance with the approved IHS Records Schedule. The disposal methods of paper medical and health records will be in accordance with the approved IHS Records Schedule. The electronic data consisting of the individual personal identifiers and PHI maintained in the RPMS or any subsequent revised IHS database system should be inactivated once the paper record is forwarded to the appropriate Federal Records Center.

SYSTEM MANAGER(S) AND ADDRESS:

Policy Coordinating Official: Director, Office of Clinical and Preventive Services, Indian Health Service, Reyes Building, 801 Thompson Avenue, Suite 300, Rockville, Maryland 20852–1627. See Appendix 1. The IHS Area Office Directors, Service Unit Directors/Chief Executive Officers and Facility Directors listed in Appendix 1 are System Managers.

NOTIFICATION PROCEDURE:

GENERAL PROCEDURE:

Requests must be made to the appropriate System Manager (IHS Area, Program Office Director or Service Unit Director/Chief Executive Officer). A subject individual who requests a copy of, or access to, his or her medical record shall, at the time the request is made, designate in writing a responsible representative who will be willing to review the record and inform the subject individual of its contents. Such a representative may be an IHS health professional. When a subject individual is seeking to obtain information about himself/herself that may be retrieved by a different name or identifier than his/her current name or identifier, he/she shall be required to produce evidence to verify that he/she is the person whose record he/she seeks. No verification of identity shall be required where the record is one that is required to be disclosed under the Freedom of Information Act. Where applicable, fees for copying records will be charged in accordance with the schedule set forth in 45 CFR Part 5b.

REQUESTS IN PERSON:

Identification papers with current photographs are preferred but not required. If a subject individual has no identification but is personally known to the designated agency employee, such employee shall make a written record verifying the subject individual's identity. If the subject individual has no identification papers, the responsible system manager or designated agency official shall require that the subject individual certify in writing that he/she is the individual whom he/she claims to be and that he/she understands that the knowing and willful request or acquisition of records concerning an individual under false pretenses is a criminal offense subject to a $5,000 fine. If an individual is unable to sign his/her name when required, he/she shall make his/her mark and have the mark verified in writing by two additional persons.

REQUESTS BY MAIL:

Written requests must contain the name and address of the requester, his/her date of birth and at least one other piece of information that is also contained in the subject record, and his/her signature for comparison purposes. If the written request does not contain sufficient information, the System Manager shall inform the requester in writing that additional, specified information is required to process the request.

REQUESTS BY TELEPHONE:

Since positive identification of the caller cannot be established, telephone requests are not honored.

PARENTS, LEGAL GUARDIANS AND PERSONAL REPRESENTATIVES:

Parents of minor children and legal guardians or personal representatives of legally incompetent individuals shall verify their own identification in the manner described above, as well as their relationship to the individual whose record is sought. A copy of the child's birth certificate or court order establishing legal guardianship may be

required if there is any doubt regarding the relationship of the individual to the patient.

RECORD ACCESS PROCEDURES:

SAME AS NOTIFICATION PROCEDURES:

Requesters may write, call or visit the last IHS facility where medical care was provided. Requesters should also provide a reasonable description of the record being sought. Requesters may also request an accounting of disclosures that have been made of their record, if any.

CONTESTING RECORD PROCEDURES:

Requesters may write, call or visit the appropriate IHS Area/Program Office Director or Service Unit Director/Chief Executive Officer at his/her address specified in Appendix 1, and specify the information being contested, the corrective action sought, and the reasons for requesting the correction, along with supporting information to show how the record is inaccurate, incomplete, untimely, or irrelevant.

RECORD SOURCE CATEGORIES:

Individual and/or family members, IHS health care personnel, contract health care providers, State and local health care provider organizations, Medicare and Medicaid funding agencies, and the SSA.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

Appendix 1—System Managers and IHS Locations Under Their Jurisdiction Where Records are Maintained:

Director, Aberdeen Area Indian Health Service, Room 309, Federal Building, 115 Fourth Avenue, SE, Aberdeen, South Dakota 57401.
Director, Cheyenne River Service Unit, Eagle Butte Indian Hospital, P.O. Box 1012, Eagle Butte, South Dakota 57625.
Director, Crow Creek Service Unit, Ft. Thompson Indian Health Center, P.O. Box 200, Ft. Thompson, South Dakota 57339.
Director, Fort Berthold Service Unit, Fort Berthold Indian Health Center, P.O. Box 400, New Town, North Dakota 58763.
Director, Carl T. Curtis Health Center, P.O. Box 250, Macy, Nebraska 68039.
Director, Fort Totten Service Unit, Fort Totten Indian Health Center, P.O. Box 200, Fort Totten, North Dakota 58335.
Director, Kyle Indian Health Center, P.O. Box 540, Kyle, South Dakota 57752.
Director, Lower Brule Indian Health Center, P.O. Box 191, Lower Brule, South Dakota 57548.
Director, McLaughlin Indian Health Center, P.O. Box 879, McLaughlin, South Dakota 57642.
Director, Omaha-Winnebago Service Unit, Winnebago Indian Hospital, Winnebago, Nebraska 68071.
Director, Pine Ridge Service Unit, Pine Ridge Indian Hospital, Pine Ridge, South Dakota 57770.
Director, Rapid City Service Unit, Rapid City Indian Hospital, 3200 Canyon Lake Drive, Rapid City, South Dakota 57701.
Director, Rosebud Service Unit, Rosebud Indian Hospital, Rosebud, South Dakota 57570.
Director, Sisseton-Wahpeton Service Unit, Sisseton Indian Hospital, P.O. Box 189, Sisseton, South Dakota 57262.
Director, Standing Rock Service Unit, Fort Yates Indian Hospital, P.O. Box J, Fort Yates, North Dakota 58538.
Director, Trenton-Williston Indian Health Center, P.O. Box 210, Trenton, North Dakota 58853.
Director, Turtle Mountain Service Unit, Belcourt Indian Hospital, P.O. Box 160, Belcourt, North Dakota 58316.
Director, Wanblee Indian Health Center, 100 Clinic Drive, Wanblee, South Dakota 57577.
Director, Yankton-Wagner Service Unit, Wagner Indian Hospital, 110 Washington Street, Wagner, South Dakota 57380.
Director, Youth Regional Treatment Center, P.O. Box #68, Mobridge, South Dakota 57601.
Director, Sac & Fox Health Center, 307 Meskwaki Road, Tama, Iowa 52339.
Director, Santee Health Center, 425 Frazier Avenue, N ST Street #2, Niobrara, Nebraska 68760.
Director, Alaska Area Native Indian Health Service, 4141 Ambassador Drive, Suite 300, Anchorage, Alaska 99508–5928.
Director, Albuquerque Area Indian Health Service, 5300 Homestead Road, NE, Albuquerque, New Mexico 87110.
Director, Acoma-Canoncito-Laguna Service Unit, Acoma-Canoncito-Laguna Indian Hospital, P.O. Box 130, San Fidel, New Mexico 87049.
Director, ToHajille Health Center, P.O. Box 3528, Canoncito, New Mexico 87026.
Director, New Sunrise Treatment Center, P.O. Box 219, San Fidel, New Mexico 87049.
Director, Albuquerque Service Unit, Albuquerque Indian Hospital, 801 Vassar Drive, NE, Albuquerque, New Mexico 87049.
Director, Albuquerque Indian Dental Clinic, P.O. Box 67830, Albuquerque, New Mexico 87193.
Director, Alamo Navajo Health Center, P.O. Box 907, Magdalena, New Mexico 87825.
Director, Jemez PHS Health Center, P.O. Box 279, Jemez, New Mexico 87024
Director, Santa Ana PHS Health Center, P.O. Box 37, Bernalillo, New Mexico 87004.
Director, Sandia PHS Health Center, P.O. Box 6008, Bernalillo, New Mexico 87004.
Director, Zia PHS Health Center, 155 Capital Square, Zia, New Mexico 87053.
Director, Santa Fe Service Unit, Santa Fe Indian Hospital, 1700 Cerrillos Road, Santa Fe, New Mexico 87501.
Director, Santa Clara Health Center, RR5, Box 446, Espanola, New Mexico 87532.
Director, San Felipe Health Center, P.O. Box 4344, San Felipe, New Mexico 87001.
Director, Cochiti Health Center, P.O. Box 105, 255 Cochiti Street, Cochiti, New Mexico 87072.
Director, Santo Domingo Health Center, P.O. Box 340, Santo Domingo, New Mexico 87052.
Director, Southern Colorado-Ute Service Unit, P.O. Box 778, Ignacio, Colorado 81137.
Director, Ignacio Indian Health Center, P.O. Box 889, Ignacio, Colorado 81137.
Director, Towaoc Ute Health Center, Towaoc, Colorado 81334.
Director, Jicarilla Indian Health Center, P.O. Box 187, Dulce, New Mexico 87528.
Director, Mescalero Service Unit, Mescalero Indian Hospital, P.O. Box 210, Mescalero, New Mexico 88340.
Director, Taos/Picuris Indian Health Center, P.O. Box 1956, 1090 Goat Springs Road, Taos, New Mexico 87571.
Director, Zuni Service Unit, Zuni Indian Hospital, Zuni, New Mexico 87327.
Director, Pine Hill Health Center, P.O. Box 310, Pine Hill, New Mexico 87357.
Director, Bemidji Area Indian Health Service, 522 Minnesota Avenue, N.W., Bemidji, Minnesota 56601.
Director, Red Lake Service Unit, PHS Indian Hospital, Highway 1, Red Lake, Minnesota 56671.
Director, Leech Lake Service Unit, PHS Indian Hospital, 425 7th Street, NW., Cass Lake, Minnesota 56633.
Director, White Earth Service Unit, PHS Indian Hospital, P.O. Box 358, White Earth, Minnesota 56591.
Director, Billings Area Indian Health Service, P.O. Box 36600, 2900 4th Avenue North, Billings, Montana 59101.
Director, Blackfeet Service Unit, Browning Indian Hospital, P.O. Box 760, Browning, Montana 59417.
Director, Heart Butte PHS Indian Health Clinic, Heart Butte, Montana 59448.
Director, Crow Service Unit, Crow Indian Hospital, Crow Agency, Montana 59022.
Director, Lodge Grass PHS Indian Health Center, Lodge Grass, Montana 59090.
Director, Pryor PHS Indian Health Clinic, P.O. Box 9, Pryor, Montana 59066.
Director, Fort Peck Service Unit, Poplar Indian Hospital, Poplar, Montana 59255.
Director, Fort Belknap Service Unit, Harlem Indian Hospital, Harlem, Montana 59526.
Director, Hays PHS Indian Health Clinic, Hays, Montana 59526.
Director, Northern Cheyenne Service Unit, Lame Deer Indian Health Center, Lame Deer, Montana 59043.
Director, Wind River Service Unit, Fort Washakie Indian Health Center, Fort Washakie, Wyoming 82514.
Director, Arapahoe Indian Health Center, Arapahoe, Wyoming 82510.
Director, Chief Redstone Indian Health Center, Wolf Point, Montana 59201.
Director, California Area Indian Health Service, John E. Moss Federal Building, 650 Capitol Mall, Suite 7–100, Sacramento, California 95814.
Director, Nashville Area Indian Health Service, 711 Stewarts Ferry Pike, Nashville, Tennessee 37214–2634.
Director, Catawba PHS Indian Nation of South Carolina, P.O. Box 188, Catawba, South Carolina 29704.
Director, Unity Regional Youth Treatment Center, P.O. Box C–201, Cherokee, North Carolina 28719.

Director, Navajo Area Indian Health Service, P.O. Box 9020, Highway 264, Window Rock, Arizona 86515–9020.
Director, Chinle Service Unit, Chinle Comprehensive Health Care Facility, PO Drawer PH, Chinle, Arizona 86503.
Director, Tsaile Health Center, P.O. Box 467, Navajo Routes 64 and 12, Tsaile, Arizona 86556.
Director, Rock Point Field Clinic, c/o Tsaile Health Center, P.O. Box 647, Tsaile, Arizona 86557.
Director, Pinon Health Station, Pinon, Arizona 86510.
Director, Crownpoint Service Unit, Crownpoint Comprehensive Health Care Facility, P.O. Box 358, Crownpoint, New Mexico 87313.
Director, Pueblo Pintado Health Station, c/o Crownpoint Comprehensive Health Care Facility, P.O. Box 358, Crownpoint, New Mexico 87313.
Director, Fort Defiance Service Unit, Fort Defiance Indian Hospital, P.O. Box 649, Intersection of Navajo Routes N12 & N7, Fort Defiance, Arizona 86515.
Director, Nahata Dziil Health Center, P.O. Box 125, Sanders, Arizona 86512.
Director, Gallup Service Unit, Gallup Indian Medical Center, P.O. Box 1337, Nizhoni Boulevard, Gallup, New Mexico 87305.
Director, Tohatchi Indian Health Center, P.O. Box 142, Tohatchi, New Mexico 87325.
Director, Ft. Wingate Health Station, c/o Gallup Indian Medical Center, P.O. Box 1337, Gallup, New Mexico 87305.
Director, Kayenta Service Unit, Kayenta Indian Health Center, P.O. Box 368, Kayenta, Arizona 86033.
Director, Inscription House Health Center, P.O. Box 7397, Shonto, Arizona 86054.
Director, Dennehotso Clinic, c/o Kayenta Health Center, P.O. Box 368, Kayenta, Arizona 86033.
Director, Shiprock Service Unit, Northern Navajo Medical Center, P.O. Box 160, U.S. Hwy 491 North, Shiprock, New Mexico 87420.
Director, Dzilth-Na-O-Dith-Hle Indian Health Center, 6 Road 7586, Bloomfield, New Mexico 87413.
Director, Teecnospos Health Center, P.O. Box 103, N5114 BIA School Road, Teecnospos, Arizona 86514.
Director, Sanostee Health Station, c/o Northern Navajo Medical Center, P.O. Box 160, Shiprock, New Mexico 87420.
Director, Toadlena Health Station, c/o Northern Navajo Medical Center, P.O. Box 160, Shiprock, New Mexico 87420.
Director, Teen Life Center, c/o Northern Navajo Medical Center, P.O. Box 160, Shiprock, New Mexico 87420.
Director, Oklahoma City Area Indian Health Service, Five Corporation Plaza, 3625 NW 56th Street, Oklahoma City, Oklahoma 73112.
Director, Claremore Service Unit, Claremore Comprehensive Indian Health Facility, West Will Rogers Boulevard and Moore, Claremore, Oklahoma 74017.
Director, Clinton Service Unit, Clinton Indian Hospital, Route 1, Box 3060, Clinton, Oklahoma 73601–9303.
Director, El Reno PHS Indian Health Clinic, 1631A E. Highway 66, El Reno, Oklahoma 73036.
Director, Watonga Indian Health Center, Route 1, Box 34-A, Watonga, Oklahoma 73772.
Director, Haskell Service Unit, PHS Indian Health Center, 2415 Massachusetts Avenue, Lawrence, Kansas 66044.
Director, Lawton Service Unit, Lawton Indian Hospital, 1515 Lawrie Tatum Road, Lawton, Oklahoma 73501.
Director, Anadarko Indian Health Center, P.O. Box 828, Anadarko, Oklahoma 73005.
Director, Carnegie Indian Health Center, P.O. Box 1120, Carnegie, Oklahoma 73150.
Director, Holton Service Unit, PHS Indian Health Center, 100 West 6th Street, Holton, Kansas 66436.
Director, Pawnee Service Unit, Pawnee Indian Service Center, RR2, Box 1, Pawnee, Oklahoma 74058–9247.
Director, Pawhuska Indian Health Center, 715 Grandview, Pawhuska, Oklahoma 74056.
Director, Tahlequah Service Unit, W. W. Hastings Indian Hospital, 100 S. Bliss, Tahlequah, Oklahoma 74464.
Director, Wewoka Indian Health Center, P.O. Box 1475, Wewoka, Oklahoma 74884.
Director, Phoenix Area Indian Health Service, Two Renaissance Square, 40 North Central Avenue, Phoenix, Arizona 85004.
Director, Colorado River Service Unit, Chemehuevi Indian Health Clinic, P.O. Box 1858, Havasu Landing, California 92363.
Director, Colorado River Service Unit, Havasupai Indian Health Station, P.O. Box 129, Supai, Arizona 86435.
Director, Colorado River Service Unit, Parker Indian Health Center, 12033 Agency Road, Parker, Arizona 85344.
Director, Colorado River Service Unit, Peach Springs Indian Health Center, P.O. Box 190, Peach Springs, Arizona 86434.
Director, Colorado River Service Unit, Sherman Indian High School, 9010 Magnolia Avenue, Riverside, California 92503.
Director, Elko Service Unit, Newe Medical Clinic, 400 ''A'' Newe View, Ely, Nevada 89301.
Director, Elko Service Unit, Southern Bands Health Center, 515 Shoshone Circle, Elko, Nevada 89801.
Director, Fort Yuma Service Unit, Fort Yuma Indian Hospital, P.O. Box 1368, Fort Yuma, Arizona 85366.
Director, Keams Canyon Service Unit, Hopi Health Care Center, P.O. Box 4000, Polacca, Arizona 86042.
Director, Schurz Service Unit, Schurz Service Unit Administration, Drawer A, Schurz, Nevada 89427.
Director, Phoenix Service Unit, Phoenix Indian Medical Center, 4212 North 16th Street, Phoenix, Arizona 85016.
Director, Phoenix Service Unit, Salt River Health Center, 10005 East Osborn Road, Scottsdale, Arizona 85256.
Director, San Carlos Service Unit, Bylas Indian Health Center, P.O. Box 208, Bylas, Arizona 85550.
Director, San Carlos Service Unit, San Carlos Indian Hospital, P.O. Box 208, San Carlos, Arizona 85550.
Director, Unitah and Ouray Service Unit, Fort Duchesne Indian Health Center, P.O. Box 160, Ft. Duchesne, Utah 84026.
Director, Whiteriver Service Unit, Cibecue Health Center, P.O. Box 37, Cibecue, Arizona 85941.
Director, Whiteriver Service Unit, Whiteriver Indian Hospital, P.O. Box 860, Whiteriver, Arizona 85941.
Director, Desert Vision Youth Wellness Center/RTC, P.O. Box 458, Sacaton, AZ 85247.
Director, Portland Area Indian Health Service, Room 476, Federal Building, 1220 Southwest Third Avenue, Portland, Oregon 97204–2829.
Director, Colville Service Unit, Colville Indian Health Center, P.O. Box 71–Agency Campus, Nespelem, Washington 99155.
Director, Fort Hall Service Unit, Not-Tsoo Gah-Nee Health Center, P.O. Box 717, Fort Hall, Idaho 83203.
Director, Neah Bay Service Unit, Sophie Trettevick Indian Health Center, P.O. Box 410, Neah Bay, Washington 98357.
Director, Warm Springs Service Unit, Warm Springs Indian Health Center, P.O. Box 1209, Warm Springs, Oregon 97761.
Director, Wellpinit Service Unit, David C. Wynecoop Memorial Clinic, P.O. Box 357, Wellpinit, Washington 99040.
Director, Western Oregon Service Unit, Chemawa Indian Health Center, 3750 Chemawa Road, NE, Salem, Oregon 97305–1198.
Director, Yakama Service Unit, Yakama Indian Health Center, 401 Buster Road, Toppenish, Washington 98948.
Director, Tucson Area Indian Health Service, 7900 South ''J'' Stock Road, Tucson, Arizona 85746–9352.
Director, Pascua Yaqui Service Unit, Division of Public Health, 7900 South ''J'' Stock Road, Tucson, Arizona 85746.
Director, San Xavier Indian Health Center, 7900 South ''J'' Stock Road, Tucson, Arizona 85746.
Director, Sells Service Unit, Santa Rosa Indian Health Center, HCO1, Box 8700, Sells, Arizona 85634.
Director, Sells Service Unit, Sells Indian Hospital, P.O. Box 548, Sells, Arizona 85634.
Director, Sells Service Unit, West Side Health Station, P.O. Box 548, Sells, Arizona 85634.

Appendix 2—Federal Archives and Records Centers

District of Columbia, Maryland Except U.S. Court Records for Maryland, Washington National Records Center, 4205 Suitland Road, Suitland, Maryland 20746–8001.
Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont, Federal Archives and Records Center, Frederick C. Murphy Federal Center, 380 Trapelo Road, Waltham, Massachusetts 02452–6399.
Northeast Region, Federal Archives and Records Center, 10 Conte Drive, Pittsfield, Massachusetts 01201–8230.
Mid-Atlantic Region and Pennsylvania, Federal Archives and Records Center, 14700 Townsend Road, Philadelphia, Pennsylvania 19154–1096.
Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee, Federal Archives

and Records Center, 1557 St. Joseph Avenue, East Point, Georgia 30344–2593.

Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin and U.S. Court Records for the mentioned States, Federal Archives and Records Center, 7358 South Pulaski Road, Chicago, Illinois 60629–5898.

Michigan, Except U.S. Court Records, Federal Records Center, 3150 Springboro Road, Dayton, Ohio 45439–1883.

Kansas, Iowa, Missouri and Nebraska, and U.S. Court Records for the mentioned States, Federal Archives and Records Center, 2312 East Bannister Road, Kansas City, Missouri 64131–3011.

New Jersey, New York, Puerto Rico, and the U.S. Virgin Islands, and U.S. Court Records for the mentioned States and territories, 200 Space Center Drive, Lee's Summit, Missouri 64064–1182.

Arkansas, Louisiana, Oklahoma and Texas, and U.S. Courts Records for the mentioned States, Federal Archives and Records Center, P.O. Box 6216, Ft. Worth, Texas 76115–0216.

Colorado, Wyoming, Utah, Montana, New Mexico, North Dakota, and South Dakota, and U.S. Courts Records for the mentioned States, Federal Archives and Records Center, P.O. Box 25307, Denver, Colorado 80225–0307.

Northern California Except Southern California, Hawaii, and Nevada Except Clark County, the Pacific Trust Territories, and American Samoa, and U.S. Courts Records for the mentioned States and territories, Federal Archives and Records Center, 1000 Commodore Drive, San Bruno, California 94066–2350.

Arizona, Southern California, and Clark County, Nevada, and U.S. Courts Records for the mentioned States, Federal Archives and Records Center, 24000 Avila Road, 1st Floor, East Entrance, Laguna Niguel, California 92677–3497.

Washington, Oregon, Idaho and Alaska, and U.S. Courts Records for the mentioned States, Federal Archives and Records Center, 6125 Sand Point Way NE, Seattle, Washington 98115–7999.

[FR Doc. 05–16890 Filed 8–24–05; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4975–N–26]

Notice of Proposed Information Collection: Comment Request; Contractor's Requisition Project Mortgages

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* October 24, 2005.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Wayne Eddins, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., L'Enfant Plaza Building, Room 8001, Washington, DC 20410 or *Wayne_Eddins@hud.gov*.

FOR FURTHER INFORMATION CONTACT: Michael McCullough, Director, Office of Multifamily Development, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–1142 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Contractor's Requisition Project Mortgages.

OMB Control Number, if applicable: 2502–0028.

Description of the need for the information and proposed use: This information is collected on form HUD–92448 from contractors and is used to obtain program benefits, consisting of distribution of insured mortgage proceeds when construction costs are involved. The information regarding completed work items is used by the Multifamily Hub Centers to ensure that payments from mortgage proceeds are made for work actually completed in a satisfactory manner. The certification regarding prevailing wages is used by the Multifamily Hub Centers to ensure compliance with prevailing wage rates.

Agency form numbers, if applicable: HUD–92448.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of respondents is 1,300 generating 15,600 responses annually, the estimated time needed to prepare each response is approximately 6 hours, the frequency of response is monthly, and the total burden hours requested is 93,600.

Status of the proposed information collection: This is an extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: August 16, 2005.

Frank L. Davis,

General Deputy Assistant Secretary for Housing—Deputy Federal Housing Commissioner.

[FR Doc. E5–4635 Filed 8–24–05; 8:45 am]

BILLING CODE 4210–27–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4975–N–27]

Notice of Proposed Information Collection: Comment Request; Application for Housing Assistance Payments; Special Claims Processing

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* October 24, 2005.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Wayne Eddins, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., L'Enfant Plaza Building, Room 8001, Washington, DC 20410 or *Wayne_Eddins@hud.gov*.

FOR FURTHER INFORMATION CONTACT: Lanier Hylton, Director, Office of Housing Assistance and Contract Administration Oversight, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–2677 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Application for Housing Assistance Payments; Special Claims Processing.

OMB Control Number, if applicable: 2502–182.

Description of the need for the information and proposed use: Vouchers are submitted by owners/agents to HUD or their Contract Administrators (CA)/Performance Based Contract Administrators (PBCA) each month to receive assistance payments for the difference between the gross rent and the total tenant payment for all assisted tenants. In the instance of special claims, vouchers are submitted by owners/agents to HUD or their CA/PBCA to receive an amount of offset unpaid rents, tenant damages, vacancies, and/or debt service losses.

Agency form numbers, if applicable: HUD–52670; HUD–52670A, Part 1; HUD–52670A, Part 2; HUD–52671A, HUD–52671B, HUD–52671C, HUD–52671D.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The estimated total number of hours needed to prepare the information collection is 313,534; the number of respondents is 23,500 generating approximately 300,996 annual responses; the frequency of response is on occasion and monthly; and the estimated time needed to prepare the response varies from 1 hour to 2.66 hours.

Status of the proposed information collection: Revision of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: August 18, 2005.

Frank L. Davis,

General Deputy Assistant Secretary for Housing—Deputy Federal Housing Commissioner.

[FR Doc. E5–4636 Filed 8–24–05; 8:45 am]

BILLING CODE 4210–27–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Information Collection Renewal Sent to the Office of Management and Budget (OMB) for Approval Under the Paperwork Reduction Act; OMB Control No. 1018–0100; Information Collection in Support of Grant Programs Authorized by the North American Wetlands Conservation Act (NAWCA)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (Fish and Wildlife Service, Service) have sent a request to OMB to renew the collection of information described below. We use the information collected to conduct our NAWCA grant programs in the manner prescribed by that Act, the Migratory Bird Conservation Commission, and the North American Wetlands Conservation Council. We also use the information to comply with Federal reporting requirements for grants awarded under the program.

DATES: You must submit comments on or before September 26, 2005.

ADDRESSES: Send your comments and suggestions on this information collection renewal to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–6566 (fax) or *OIRA_DOCKET@OMB.eop.gov* (e-mail). Please provide a copy of your comments to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS 222–ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); (703) 358–2269 (fax); or *hope_grey@fws.gov* (e-mail).

FOR FURTHER INFORMATION CONTACT: To request a copy of the information collection requirements, explanatory information, or related materials, contact Hope Grey at the addresses above or by phone at (703) 358–2482. For information related to the grant program, which is the subject of the information collection approval, please visit our Web site at *http://birdhabitat.fws.gov*.

SUPPLEMENTARY INFORMATION: The OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (44 U.S.C 3501 *et seq.*), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). We have asked OMB to renew approval of the collection of information for the NAWCA grants programs. The current OMB control number for this collection of information is 1018–0100, which expires on August 31, 2005. We are requesting the standard 3-year term of approval for this information collection activity. Federal agencies may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. Following our submittal, OMB has up to 60 days to approve or disapprove our information collection request; however, OMB may make its decision as early as 30 days after submittal of our request. Therefore, to ensure that your comments receive consideration, send your comments and/or suggestions to OMB by the date referenced in the **DATES** section of this notice.

We received one comment regarding this notice. The commenter did not address the necessity, clarity, or accuracy of the information collection, but stated that the North American Waterfowl Management Plan and the Council, as constituted, are used to kill waterfowl, not save them. In addition, the commenter petitions to reconstitute the Council with different members and requests program materials. We have not made any changes to our information collection as a result of the comment.

The North American Waterfowl Management Plan (NAWMP), first signed in 1986, is a tripartite agreement among Canada, Mexico, and the United States to enhance, restore, and otherwise protect continental wetlands to benefit waterfowl and other wetlands-associated wildlife through partnerships between and among the private and public sectors. Because the 1986 NAWMP did not carry with it a

mechanism to provide for broadly based and sustained financial support for wetland conservation activities, Congress passed and the President signed into law the NAWCA. The purpose of NAWCA, as amended, is to promote, through partnerships, long-term conservation of North American wetland ecosystems and the waterfowl and other migratory birds, fish, and wildlife that depend upon such habitat. Principal conservation actions supported by NAWCA are acquisition, enhancement, and restoration of wetlands and wetlands-associated habitat.

In addition to providing for a continuing and stable funding base, NAWCA establishes an administrative body, the North American Wetlands Conservation Council, made up of a State representative from each of the four flyways, three representatives from wetlands conservation organizations, the Secretary of the Board of the National Fish and Wildlife Foundation, and the Director of the Service. The Council recommends funding of select wetlands conservation project proposals to the Migratory Bird Conservation Commission (MBCC). Competing for grant funds involves applications from partnerships that describe in substantial detail project locations, project resources, future benefits, and other characteristics, to meet the standards established by the Council and the requirements of NAWCA.

Materials that describe the program and assist applicants in formulating project proposals for Council consideration are available on our Web site at *http://birdhabitat.fws.gov.* Persons who do not have access to the Web site may still obtain instructional materials by mail. There has been virtually no change in the scope and general nature of these instructions since the OMB first approved the information collection in 1999. Instructions assist applicants in formulating detailed project proposals for Council consideration. The instructional materials, including any hard or electronic copy and information or other instruments, are the basis for this information collection request. Notices of funding availability, which are updated regularly, are posted on the Grants.gov Web site *(http://www.grants.gov)* as well as in the Catalog of Federal Domestic Assistance. We use information collected under this program to respond to audits, program planning and management, program evaluation, Government Performance and Results Act reporting, Standard Form 424 (Application For Federal Assistance), grant agreements, budget reports and justifications, public and private requests for information, data provided to other programs for databases on similar programs, congressional inquiries, and reports required by NAWCA.

If we do not collect this information, we would have to eliminate the program because it would not be possible to determine eligibility and the relative worth of the proposed projects or to meet our legal responsibilities under the Act and regulations. Reducing the frequency of collection would only reduce the frequency of grant opportunities, as the information collected is unique to each project proposal. Discontinuation of the program is not a viable option.

Title of Collection: Information Collection in Support of Grant Programs Authorized by the North American Wetlands Conservation Act (NAWCA).

OMB Control Number: 1018–0100.

Form Number(s): None.

Frequency of Collection: Occasional. The Small Grants program has one project proposal period per year and the Standard Grants program has two per year. Annual reports are due 90 days after the anniversary date of the grant agreement. Final reports are due 90 days after the end of the project period. The project period is 2 years.

Description of Respondents: Households and/or individuals; businesses and/or other for-profits organizations; educational organizations; not-for-profit institutions; Federal Government; and State, local and/or tribal governments.

Total Annual Burden Hours: 37,600. We estimate 80 hours for each Small Grant and 400 hours for each Standard Grant.

Number of Respondents: Approximately 150. We estimate 70 proposals for the Small Grants program and 80 for the Standard Grants program. Approximately half of the projects submitted are funded.

We interviewed five previous and current recipients of NAWCA grants with regard to three aspects of the grants programs: the availability of the information requested, the clarity of the instructions, and the annual burden hours for preparing applications and other materials, such as annual and final reports for both the Small Grants and the Standard Grants programs. All respondents advised that the information regarding descriptions of both programs and application instructions are readily available and the clarity of the information/instructions for both programs is good, even considering the level of detail and technical information required in the Standard Grants program application.

We invite your comments on: (1) Whether or not the collection of information is necessary for the proper performance of the NAWCA grants programs, including whether or not in the opinion of the respondent the information has practical utility; (2) the accuracy of our estimate of the annual hour burden of information requested; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents. The information collection in this program is part of a system of records covered by the Privacy Act (5 U.S.C. 552(a)).

Dated: August 3, 2005.

Hope Grey,

Information Collection Clearance Officer, Fish and Wildlife Service.

[FR Doc. 05–16942 Filed 8–24–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of approved Tribal—State Compact.

SUMMARY: This notice publishes approval of the Tribal—State Compact between the State of New Mexico and the Pueblo of Pojoaque.

DATES: *Effective Date:* August 25, 2005.

FOR FURTHER INFORMATION CONTACT: George T. Skibine, Director, Office of Indian Gaming Management, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act of 1988 (IGRA), Public Law 100–497, 25 U.S.C. 2710, the Secretary of the Interior shall publish in the **Federal Register** notice of the approved Tribal-State Compacts for the purpose of engaging in Class III gaming activities on Indian lands. This Compact authorizes the Pueblo of Pojoaque of New Mexico to engage in certain Class III gaming activities on Indian lands. This compact is identical to the other New Mexico compacts that were approved by the Department in 2001.

Dated: August 16, 2005.

Michael D. Olsen,

Acting Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 05–16943 Filed 8–24–05; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK964–1410–HY–P; F–14893–B, F–14893–C, F–14893–D; BSA–2]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, DOI

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to Mary's Igloo Native Corporation. The lands are located in Lot 2, U.S. Survey No. 604, Alaska, and T. 3 S., Rgs. 30, 31, and 32 W., Kateel River Meridian; T. 4 S., R. 32 W., Kateel River Meridian; and Ts. 3 and 4 S., R. 33 W., Kateel River, Alaska, in the vicinity of Mary's Igloo Alaska, and contains 18,915.33 acres. Notice of the decision will also be published four times in the Nome Nugget.

DATES: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until September 26, 2005 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7599.

FOR FURTHER INFORMATION, CONTACT: John Leaf, by phone at (907) 271–3283, or by e-mail at *John_Leaf@ak.blm.gov*. Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330, 24 hours a day, seven days a week, to contact Mr. Leaf.

John Leaf,

Land Law Examiner, Branch of Adjudication II.

[FR Doc. 05–16869 Filed 8–24–05; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–921–03–1320–EL–P; MTM 94825]

Notice of Invitation—Coal Exploration License Application MTM 94825

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of invitation.

SUMMARY: Members of the public are hereby invited to participate with Spring Creek Coal Company in a program for the exploration of coal deposits owned by the United States of America in the following-described lands located in Big Horn County, Montana, encompassing 1917.50 acres:

T. 8 S., R. 39 E., P. M. M.
Sec. 13: NW¼, N½SW¼, N½SW¼SW¼, E½SE¼SW¼SW¼, NW¼SE¼SW¼SW¼, SE¼SW¼, SE¼
Sec. 14: N½NE¼SE¼
Sec. 15: W½SW¼SE¼, SE¼SW¼SE¼
Sec. 22: NE¼
Sec. 23: S½N½NW¼, S½NW¼
Sec. 24: NE¼NW¼
Sec. 25: SW¼SW¼
Sec. 26: S½
Sec. 27: S½NW¼, S½
Sec. 35: N½

SUPPLEMENTARY INFORMATION: Any party electing to participate in this exploration program shall notify, *in writing,* both the State Director, Bureau of Land Management, PO Box 36800, Billings, Montana 59107–6800, and Spring Creek Coal Company, PO Box 67, Decker, Montana 59025. Such written notice must refer to serial number MTM 94825 and be received no later than September 26, 2005 or 10 calendar days after the last publication of this Notice in the *Sheridan Press* newspaper, whichever is later. This Notice will be published once a week for two (2) consecutive weeks in the *Sheridan Press*, Sheridan, Wyoming.

The proposed exploration program is fully-described, and will be conducted pursuant to an exploration plan to be approved by the Bureau of Land Management. The exploration plan, as submitted by Spring Creek Coal Company, is available for public inspection at the Bureau of Land Management, 5001 Southgate Drive, Billings, Montana, during regular business hours (9 a.m. to 4 p.m.), Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Robert Giovanini, Mining Engineer, or Connie Schaff, Land Law Examiner, Branch of Solid Minerals (MT–921), Bureau of Land Management, Montana State Office, PO Box 36800, Billings, Montana 59107–6800, telephone (406) 896–5084 or (406) 896–5060, respectively.

Edward L. Hughes,

Acting Chief, Branch of Solid Minerals.

[FR Doc. 05–16872 Filed 8–24–05; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID–933–1430–ET; DK–G05–0002, IDI–08612, et al.]

Public Land Order No. 7644; Revocation of 4 Bureau of Reclamation Orders and 2 Public Land Orders; Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order revokes 4 Bureau of Reclamation Orders and 2 Public Land Orders in their entirety as they affect 6,785.75 acres of lands withdrawn for the Minidoka Reclamation Project. This order opens 2,767.04 acres of public lands to all forms of appropriation under the public land laws, and 4,018.71 acres of lands to such uses as may be authorized by law on National Forest System lands. This order also opens all of the lands to the mining laws.

EFFECTIVE DATE: September 26, 2005.

FOR FURTHER INFORMATION CONTACT: Jackie Simmons, BLM Idaho State Office, 1387 S. Vinnell Way, Boise, Idaho 83709, 208–373–3867.

SUPPLEMENTARY INFORMATION: Copies of the original withdrawal orders containing a legal description of the lands involved are available from the BLM Idaho State Office at the address above.

Order

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (2000), it is ordered as follows:

1. The following Bureau of Reclamation Orders and Public Land Orders, which withdrew a total of (a) 2,767.04 acres of public lands, and (b) 4,018.71 acres of National Forest System

lands, for the Minidoka Reclamation Project, are hereby revoked in their entirety: Bureau of Reclamation Orders dated September 6, 1956 (22 FR 2741), January 25, 1957 (22 FR 1968), June 21, 1957 (23 FR 8361), and September 5, 1957 (23 FR 2130), and Public Land Order No's. 2170 (25 FR 7497), and 3083 (28 FR 5051).

2. At 9 a.m. on September 26, 2005, the lands referenced as (a) in Paragraph 1 will be opened to all forms of appropriation under the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. All valid applications received at or prior to 9 a.m. on September 26, 2005 shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

3. At 9 a.m. on September 26, 2005, the lands referenced as (b) in Paragraph 1 will be opened to such forms of disposition as may be authorized by law on National Forest System lands, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law.

4. At 9 a.m. on September 26, 2005, all of the lands referenced in Paragraph 1 will be opened to location and entry under the United States mining laws, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. Appropriation of any of the lands identified in this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession is governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

Dated: August 11, 2005.

Rebecca W. Watson,

Assistant Secretary—Land and Minerals Management.

[FR Doc. 05–16873 Filed 8–24–05; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–090–1430–ET; MTM 89170]

Public Land Order No. 7643; Extension of Public Land Order No. 7464; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order extends Public Land Order No. 7464 for an additional 5-year period. This extension is necessary to continue to protect reclamation of the Zortman-Landusky mining area.

EFFECTIVE DATE: October 5, 2005.

FOR FURTHER INFORMATION CONTACT: Tami Lorenz, BLM Montana State Office, 406–896–5053 or Sandy Ward, BLM Montana State Office, 5001 Southgate Drive, P.O. Box 36800, Billings, Montana, 59107–6800, 406–896–5052.

SUPPLEMENTARY INFORMATION: A copy of the original withdrawal order, Public Land Order No. 7464, is available from the BLM Montana State Office at the address stated above.

Order

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (2000), it is ordered as follows:

1. Public Land Order No. 7464 (65 FR 59463, October 5, 2000), which withdrew 3,530.62 acres of public land from surface entry and mining to protect the Zortman-Landusky Mine Reclamation Site, is hereby extended for an additional 5-year period.

2. Public Land Order 7464 will expire on October 4, 2010, unless, as a result of a review conducted prior to the expiration date pursuant to Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f) (2000), the Secretary determines that the withdrawal shall be extended.

Authority: 43 CFR 2310.4.

Dated: August 10, 2005.

P. Lynn Scarlett,

Assistant Secretary—Policy, Management and Budget.

[FR Doc. 05–16871 Filed 8–24–05; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK964–1410–HY–P; AA–9206–A, SEA–3]

Alaska Lands Conveyance

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision directing conveyance of lands pursuant to the Alaska National Interest Lands Conservation Act will be issued to Shee Atika, Incorporated, for certain lands in T. 47 S., R. 66 E., Copper River Meridian, located in the vicinity of Sitka, Alaska, containing approximately 20 acres. Notice of the decision will also be published four times in the Ketchikan Daily News.

DATES: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until September 26, 2005 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7599.

FOR FURTHER INFORMATION, CONTACT: Eileen Ford, by phone at 907–271–5715, or by e-mail at *eileen_ford@ak.blm.gov*. Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330, 24 hours a day, seven days a week, to contact Ms. Ford.

Eileen Ford,

Land Law Examiner, Branch of Adjudication II.

[FR Doc. 05–16868 Filed 8–24–05; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

National Park Service

The Transportation Plan/ Draft Environmental Impact Statement, Grand Teton National Park, WY

AGENCY: National Park Service, Department of the Interior.

ACTION: This notice informs the public that the comment period for the Draft Environmental Impact Statement for the Transportation Plan, Grand Teton National Park, Wyoming, is extended.

SUMMARY: The National Park Service published a Notice of Availability on June 6, 2005 (70 FR 107) for the draft Environmental Impact Statement for the Transportation Plan, Grand Teton National Park, Wyoming. The public comment period was to expire on August 1, 2005. This notice extends the public comment period until August 25, 2005.

DATES: Comments on the DEIS must be received by August 25, 2005.

ADDRESSES: Information will be available for public review and comment at the Park Headquarters Visitor Center in Moose, Wyoming and the Reference Desk of the Teton County Library in Jackson, Wyoming. It will also be available online at both *http://parkplanning.nps.gov* and *http://www.nps.gov/grte/plans/planning.htm*.

FOR FURTHER INFORMATION CONTACT: Mary Gibson Scott, Superintendent, Grand Teton National Park, PO Drawer 170, Moose, Wyoming, 83012–0170, (370) 739–3410.

SUPPLEMENTARY INFORMATION: If you wish to comment, you may submit your comments by any one of several methods. You may mail comments to Superintendent Office, P.O. Drawer 170, Moose, Wyoming 83012–0170, Attention: Transportation Plan. You may also comment via the e-mail to *http://parkplanning.nps.gov*, choose ''Grand Teton National Park'' or ''*Plan/Documents Open for Comment*'' and then click ''*Comment on Document*''. Finally, you may hand-deliver comments to the Grand Teton Visitor Center, Moose, Wyoming. Our practice is to make comments, including names and home addresses of respondents, available for public review during business hours. Individual respondents may request that we withhold their home address from the record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Dated: July 26, 2005.

Kate Cannon,

Acting Deputy Regional Director, Intermountain Region, National Park Service.

[FR Doc. 05–16874 Filed 8–24–05; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

Boston Harbor Islands Advisory Council; Notice of Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act (Pub. L. 92–463) that the Boston Harbor Islands Advisory Council will meet on Wednesday, September 7, 2005. The meeting will convene at 6 p.m. at the New England Aquarium Conference Center, Central Wharf, Boston, MA.

The Advisory Council was appointed by the Director of National Park Service pursuant to Public Law 104–333. The 28 members represent business, educational/cultural, community and environmental entities; municipalities surrounding Boston Harbor; Boston Harbor advocates; and Native American interests. The purpose of the Council is to advise and make recommendations to the Boston Harbor Islands Partnership with respect to the development and implementation of a management plan and the operations of the Boston Harbor Islands national park area.

The Agenda for this meeting is as follows:

1. Call to Order, Introductions of Advisory Council members present
2. Review and approval of minutes of the June meeting
3. Youth Program Report
4. Peddocks Island-Fort Andrews Preservation and Adaptive Reuse Project
5. Review of Summer Season
6. Report from the NPS
7. Public Comment
8. Next Meetings
9. Adjourn

The meeting is open to the public. Further information concerning Council meetings may be obtained from the Superintendent, Boston Harbor Islands. Interested persons may make oral/written presentations to the Council or file written statements. Such requests should be made at least seven days prior to the meeting to: Superintendent, Boston Harbor Islands NRA, 408 Atlantic Avenue, Boston, MA 02110, telephone (617) 223–8667.

Dated: July 19, 2005.

Bruce Jacobson,

Superintendent, Boston Harbor Islands NRA.

[FR Doc. 05–16877 Filed 8–24–05; 8:45 am]

BILLING CODE 4312–52–M

DEPARTMENT OF THE INTERIOR

National Park Service

Cape Cod National Seashore, South Wellfleet, MA; Cape Cod National Seashore Advisory Commission Two Hundred Fifty-Fourth Notice of Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770, 5 U.S.C. App 1, Section 10), that a meeting of the Cape Cod National Seashore Advisory Commission will be held on September 26, 2005.

The Commission was reestablished pursuant to Public Law 87–126 as amended by Public Law 105–280. The purpose of the Commission is to consult with the Secretary of the Interior, or her designee, with respect to matters relating to the development of Cape Cod National Seashore, and with respect to carrying out the provisions of sections 4 and 5 of the Act establishing the Seashore.

The Commission members will meet at 1 p.m. in the meeting room at Headquarters, Marconi Station, Wellfleet, Massachusetts for the regular business meeting to discuss the following:

1. Adoption of Agenda
2. Approval of Minutes of Previous Meeting (June 20, 2005)
3. Reports of Officers
4. Reports of Subcommittees
5. Superintendent's Report
   Salt Pond Visitor Center Update
   Highlands Center Update
   Update on Dune Shack Report
   ORV's
   East Harbor/Pilgrim Lake
   Herring River Restoration Project
   Wilderness Areas
   Wind Turbines/Cell Towers
   News from Washington
6. Old Business
7. New Business
8. Date and agenda for next meeting
9. Public comment and
10. Adjournment

The meeting is open to the public. It is expected that 15 persons will be able to attend the meeting in addition to Commission members.

Interested persons may make oral/written presentations to the Commission during the business meeting or file written statements. Such requests should be made to the park

superintendent at least seven days prior to the meeting. Further information concerning the meeting may be obtained from the Superintendent, Cape Cod National Seashore, 99 Marconi Site Road, Wellfleet, MA 02667.

Dated: July 26, 2005.

Sue Moynihan,

Acting Superintendent.

[FR Doc. 05–16876 Filed 8–24–05; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

Chesapeake and Ohio Canal National Historical Park Advisory Commission; Notice of Public Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act that a meeting of the Chesapeake and Ohio Canal National Historical Park Advisory Commission will be held at 9:30 a.m. on Friday, September 9, 2005, Rockwood Manor, Brooke Hall, Potomac, Maryland

The Commission was established by Public Law 91–664 to meet and consult with the Secretary of the Interior on general policies and specific matters related to the administration and development of the Chesapeake and Ohio Canal National Historical Park.

The members of the Commission are as follows:

Mrs. Sheila Rabb Weidenfeld, Chairman
Mr. Charles J. Weir
Mr. Barry A. Passett
Mr. Terry W. Hepburn
Ms. Elise B. Heinz
Ms. JoAnn M. Spevacek
Mrs. Mary E. Woodward
Mrs. Donna Printz
Mrs. Ferial S. Bishop
Ms. Nancy C. Long
Mrs. Jo Reynolds
Dr. James H. Gilford
Ms. Sue Ann Sullivan
Brother James Kirkpatrick

Topics that will be presented during the meeting include:

1. Update on park planning and design projects
2. Update on major construction/development projects
3. Update on partnership projects
4. Review draft Environmental Assessment for Georgetown Boathouse proposal

The meeting will be open to the public. Any member of the public may file with the Commission a written statement concerning the matters to be discussed. Persons wishing further information concerning this meeting, or who wish to submit written Statements, may contact Kevin Brandt, Superintendent, C&O Canal National Historic Park, 1850 Dual Highway, Suite 100, Hagerstown, Maryland 21740.

Minutes of the meeting will be available for public inspection six weeks after the meeting at park headquarters, Hagerstown, Maryland.

Dated: July 21, 2005.

Robert Hartman,

Superintendent, Chesapeake and Ohio Canal National Historical Park.

[FR Doc. 05–16878 Filed 8–24–05; 8:45 am]

BILLING CODE 4312–52–M

DEPARTMENT OF THE INTERIOR

National Park Service

Flight 93 National Memorial Advisory Commission

AGENCY: National Park Service.

ACTION: Notice of September 7, 2005 meeting.

SUMMARY: This notice sets forth the date of the September 7, 2005 meeting of the Flight 93 Advisory Commission.

DATES: The public meeting of the Advisory Commission will be held on September 7, 2005 from 11 a.m. to 12 noon.

Location: The meeting will be held in the Hall of Flags at the U.S. Chamber of Commerce Building, 1615 H Street, NW., Washington, DC 20062–2000.

Agenda: The September 7, 2005 meeting will consist of:

(1) Opening of Meeting and Pledge of Allegiance.

(2) Review and Approval of Minutes from July 25, 2005.

(3) Reports from the Flight 93 Memorial Task Force design Oversight Committee on the Recommendation of a Final Design for the permanent memorial for Flight 93.

(4) Old Business/New Business.

(5) Public Comments.

(6) Closing Remarks.

FOR FURTHER INFORMATION CONTACT: Joanne M. Hanley, Superintendent, Flight 93 National Memorial, 109 West Main Street, Somerset, PA 15501, (814) 443–4557.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public. Any member of the public may file with the Commission a written statement concerning agenda items. The statement should be addressed to the Flight 93 Advisory Commission, 109 West Main Street, Somerset, PA 15501.

Dated: August 4, 2005.

Joanne M. Hanley,

Superintendent, Flight 93 National Memorial.

[FR Doc. 05–16875 Filed 8–24–05; 8:45 am]

BILLING CODE 4310–70–M

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Kitsap County Coroner's Office, Port Orchard, WA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession of the Kitsap County Coroner's Office, Port Orchard, WA. The human remains are believed to have been removed from Bremerton, Kitsap County, WA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by the Kitsap County Coroner's Office professional staff in consultation with representatives of the Suquamish Indian Tribe of the Port Madison Reservation, Washington.

Prior to 1998, human remains representing a minimum of two individuals were removed from an unknown site in Bremerton, Kitsap County, WA. There is limited information regarding the circumstances surrounding the removal of the human remains. The human remains are believed to have been removed from private residential property in Bremerton, however, research of archived records reveals no documentation detailing the event. The property owner allegedly brought the human remains to the Kitsap County Coroner's Office where they have since been housed. No known individuals were identified. No associated funerary objects are present.

The human remains have been determined to be Native American based on morphology. The geographical area from which the remains are presumed to have been removed indicates affiliation with the Suquamish

Indian Tribe of the Port Madison Reservation, Washington. Historical evidence presented during consultation supports this determination.

Officials of the Kitsap County Coroner's Office have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains listed above represent the physical remains of a minimum of two individuals of Native American ancestry. Officials of the Kitsap County Coroner's Office also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Suquamish Indian Tribe of the Port Madison Reservation, Washington.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Louise Hall, Chief Deputy Coroner, Kitsap County Coroner's Office, 714 Division Street MS–17, Port Orchard, WA 98366, telephone (360) 337–5603, before September 26, 2005. Repatriation of the human remains to the Suquamish Indian Tribe of the Port Madison Reservation, Washington may proceed after that date if no additional claimants come forward.

Kitsap County Coroner's Office is responsible for notifying the Suquamish Indian Tribe of the Port Madison Reservation, Washington that this notice has been published.

Dated: July 22, 2005.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. 05–16879 Filed 8–24–05; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Louisiana State University Museum of Natural Science, Baton Rouge, LA; Correction

AGENCY: National Park Service, Interior.

ACTION: Notice; correction.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 43 CFR 10.8 (f), that, upon publication of this notice in the **Federal Register**, the Louisiana State University Museum of Natural Science, Baton Rouge, LA, rescinds the notice of inventory completion published in the **Federal Register** of December 13, 2000 (FR Doc 00–31659, 77908) because the Louisiana State University Museum of Natural Science has determined that the Mississippi Department of Archives and History, Historic Preservation Division, Jackson, MS, has legal control of the human remains and associated funerary objects from the Fatherland site (22AD001), Adams County, MS.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d) (3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

The December 13, 2000, notice identified the Louisiana State University Museum of Natural Science as having possession of human remains and associated funerary objects from the Fatherland site (22AD001), Adams County, MS. Following publication of the notice, Mississippi Department of Archives and History, Historic Preservation Division submitted additional documentation regarding control of the aforementioned items to the Louisiana State University Museum of Natural Science. Upon evaluation of the new documentation, Louisiana State University Museum of Natural Science reconsidered its control of the human remains and associated funerary objects from the Fatherland site (22AD001) and transferred possession to the Mississippi Department of Archives and History, Historic Preservation Division in March 2005. The human remains and associated funerary objects are now in the possession and control of the Mississippi Department of Archives and History, Historic Preservation Division.

The Mississippi Department of Archives and History, Historic Preservation Division, as the museum in control of the human remains and associated funerary objects, is responsible for determining cultural affiliation of the human remains and associated funerary objects from the Fatherland site (22AD001). The Mississippi Department of Archives and History, Historic Preservation Division will consult and notify the proper groups once cultural affiliation is determined.

Representatives of any tribal government who wish to comment on this notice should address their comments to Pamela D. Edwards, Mississippi Department of Archives and History, Historic Preservation Division, P.O. Box 571, Jackson, MS 39205, telephone (601) 576–6940.

Louisiana State University Museum of Natural Science is responsible for notifying the Chitimacha Tribe of Louisiana that this notice has been published.

Dated: July 22, 2005.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. 05–16884 Filed 8–24–05; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: Mississippi Department of Archives and History, Historic Preservation Division, Jackson, MS

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the possession of the Mississippi Department of Archives and History, Historic Preservation Division, Jackson, MS, that meet the definition of ''unassociated funerary objects'' under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

An assessment of the cultural items was made by the Mississippi Department of Archives and History, Historic Preservation Division professional staff in consultation with representatives of the Chickasaw Nation, Oklahoma.

In the summer of 1937, one cultural item was removed from the McCullough site (MLe11), Lee County, MS, along a ridgetop south of Kings Creek, by Moreau Chambers, an archeologist with the Mississippi Department of Archives and History, Historic Preservation Division as part of an ongoing survey and legally authorized excavation. The excavation and survey were undertaken to study Chickasaw culture in Lee County, MS, and to find the location of the Battle of Ackia, as part of the process for establishing Ackia Battleground National Monument. The one cultural item, a shell gorget, was found in association with Native American human remains.

The McCullough site (MLe11) was determined by Mr. Chambers not to be the location of the Battle of Ackia, but a multi-component site consisting of a possibly late prehistoric component, an early Chickasaw component, and a later historic Chickasaw component based on the type of prehistoric and historic artifacts found, ethnohistorical maps, local tradition, and archeological findings (Atkinson 1985; B. Lieb, personal communication 2005; Stubbs 1982). The ethnohistorical maps show this area to be inhabited by historic Chickasaw. Allotment records also show that Ah Thla Tubby, a Chickasaw, was allotted this section of land in 1836 (Stubbs 1982).

In the summer of 1937, Mr. Chambers removed cultural items from the Alston-Wilson site (MLe14), Lee County, MS. The 550 cultural items are 1 shell ear plug; 6 grog-tempered potsherds; 1 gunspall; 1 clear, cut-faceted, crystal bead; 455 blue seed beads (Type IIA4); 15 large, wound, glass necklace beads with a heavy patina (Type WIA6); 29 wound, mold-faceted, clear, glass necklace beads (Type WIIA2); 12 blue, faceted glass necklace beads (Type WIIA3); 1 wound, mold-faceted, amber glass necklace bead (Type WIIA4); 9 drawn and wound, black and white (''rattlesnake'') beads (Type WIIIA5); 1 drawn, spiral-striped, black and white bead (Type WIIIA3); 18 tubular, faceted, translucent beads (Type WIIC1); and 1 translucent, oval-shaped, faceted necklace bead (Type WIC1). The 550 cultural items were found in association with Native American human remains.

The human remains associated with these cultural items from the McCullough and Alston-Wilson sites were stored in an off-site repository in Jackson, MS. In the 1940s, the repository burned and the human remains were destroyed and are no longer in the possession of the Mississippi Department of Archives and History, Historic Preservation Division.

The Alston-Wilson site, now better known as MLe14 because of later excavations by Jesse Jennings in 1939 on behalf of the National Park Service, was excavated one month after the McCullough site and has a major occupation dating to A.D.1730–1750. Archeological evidence found at the Alston-Wilson site suggests that this site was part of a major historic Chickasaw village. In the 1730s, there were two major villages in the vicinity of the Alston-Wilson site that were occupied by the Chickasaw: Tchichatala and Falatchao. Tchichatala was a major Chickasaw village. Falatchao was a ''white mother town'' meaning it was both a ''white'' town (or a peace town, as opposed to a ''red'' war town) and ''mother'' town from which other towns emerged (Hudson 1976:238–239: Nairne [1708] 1988:38).

Both Tchichatala and Falatchao are recognized in historical documents as being occupied by the Chickasaw. However, because of the fluid nature of Chickasaw village occupation, it is difficult to identify the specific boundaries of historic Chickasaw villages. Therefore, based on the archeological evidence that the site was part of a major Chickasaw village and at that time both villages were in the area, the Alston-Wilson site is most probably part of either the village of Tchichatala or Falatchao (Atkinson 1985, 2004; Brad Lieb, personal communication 2004; Cook et al. 1980; Jennings 1941; Johnson et al. 2004).

Based on historical evidence that Lee County, MS, where both the Alston-Wilson site (MLe14) and the McCullough site (MLe11) are located, was occupied by the Chickasaw until their removal to Oklahoma from 1837 until 1850, both sites are probably Chickasaw. The Chickasaws are represented by the present-day Chickasaw Nation, Oklahoma.

Officials of the Mississippi Department of Archives and History, Historic Preservation Division have determined that, pursuant to 25 U.S.C. 3001 (3)(B), the 551 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual. Officials of the Mississippi Department of Archives and History, Historic Preservation Division also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and the Chickasaw Nation, Oklahoma.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the 551 unassociated funerary objects should contact Pamela D. Edwards, Mississippi Department of Archives and History, Historic Preservation Division, P. O. Box 571, Jackson, MS 39205, telephone (601) 576–6940, before September 26, 2005. Repatriation of the unassociated funerary objects to the Chickasaw Nation, Oklahoma may proceed after that date if no additional claimants come forward.

The Mississippi Department of Archives and History, Historic Preservation Division is responsible for notifying the Chickasaw Nation, Oklahoma that this notice has been published.

Dated: July 26, 2005.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. 05–16880 Filed 8–24–05; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate a Cultural Item: Neville Public Museum of Brown County, Green Bay, WI

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate a cultural item in the possession of the Neville Public Museum of Brown County, Green Bay, WI, that meets the definition of ''objects of cultural patrimony'' under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural item. The National Park Service is not responsible for the determinations in this notice.

The cultural item is a wampum belt, 30 inches long and 2 inches wide, composed of white beads strung on hemp with four intersecting rows of black beads.

Neville Public Museum of Brown County professional staff consulted with the representatives of the Oneida Tribe of Indians of Wisconsin and Stockbridge Munsee Community, Wisconsin.

In 1923, the cultural item was purchased by Arthur Neville, Director of the Green Bay City Museum. The Green Bay City Museum became the Neville Public Museum of Brown County in 1927. According to museum documentation, the wampum belt was purchased from Phoebe Quinney for $10.00. Mrs. Quinney was the widow of Osceola Quinney, Sachem of the Stockbridge Munsee Community, Wisconsin. Mr. Quinney had inherited the title and wampum belt from his father, John Quinney.

The Neville Public Museum of Brown County has determined that the wampum belt is an object of cultural patrimony that has ongoing historical, traditional, or cultural importance central to the Stockbridge Munsee Community, Wisconsin. Cultural affiliation with the Stockbridge Munsee Community, Wisconsin, and the museum's determination that the wampum belt is an object of cultural patrimony, are based on museum documentation and oral history, as well as consultation evidence presented by representatives of the Stockbridge Munsee Community, Wisconsin that indicates that no individual had or has the right to alienate a wampum belt.

Officials of the Neville Public Museum of Brown County have determined that, pursuant to 25 U.S.C. 3001 (3)(D), the one cultural item described above has ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual. Officials of the Neville Public Museum of Brown County also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the object of cultural patrimony and the Stockbridge Munsee Community, Wisconsin.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the one object of cultural patrimony should contact Eugene Umberger, Director, Neville Public Museum of Brown County, 210 Museum Place, Green Bay, WI 54303, telephone (920) 448–4460, before September 26, 2005. Repatriation of the object of cultural patrimony to the Stockbridge Munsee Community, Wisconsin may proceed after that date if no additional claimants come forward.

Neville Public Museum of Brown County is responsible for notifying the Oneida Tribe of Indians of Wisconsin and Stockbridge Munsee Community, Wisconsin that this notice has been published.

Dated: July 26, 2005.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. 05–16882 Filed 8–24–05; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA

AGENCY: National Park Service, Interior.

ACTION: Notice.

This notice rescinds the **Federal Register** Notice of Intent to Repatriate Cultural Items of December 10, 2003, FR Doc. 03–30567, page 68950. This notice changes the cultural items described in the previously published notice from unassociated funerary objects to associated funerary objects and adds the human remains representing a minimum of one individual.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of the Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA. The human remains and associated funerary objects were removed from West Warwick, Kent County, RI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Peabody Museum of Archaeology and Ethnology professional staff in consultation with representatives of the Narragansett Indian Tribe of Rhode Island.

In 1957, human remains representing a minimum of one individual were removed from West Warwick, Kent County, RI, by Dave Straight. The human remains were donated to the Peabody Museum of Archaeology and Ethnology by the Massachusetts Archaeological Society through Maurice Robbins later that same year. The human remains were found during the Peabody Museum of Archaeology and Ethnology's inventory process after the publication of the Notice of Intent to Repatriate Cultural Items on December 10, 2003. The two associated funerary objects are one bag of bark fragments and one box of brass kettle fragments.

This interment most likely dates to the post-contact period or later (post A.D. 1500). Copper and brass kettles were European trade items, and therefore support a post-contact temporal context for the burial. In addition, museum documentation describes the human remains as ''Narragansett.'' Such a specific attribution suggests that the burial dates to the Historic period. The burial context indicates that the burial was of a Native American. Oral tradition and historical documentation indicate that West Warwick, RI, is within the aboriginal and historic homeland of the Narragansett people during the Contact period. The present-day tribe representing the Narragansett people is the Narragansett Indian Tribe of Rhode Island.

Officials of the Peabody Museum of Archaeology and Ethnology have determined that, pursuant to 25 U.S.C. 3001 (9-10), the human remains listed above represent the physical remains of one individual of Native American ancestry. Officials of the Peabody Museum of Archaeology and Ethnology also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the two objects listed above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Peabody Museum of Archaeology and Ethnology have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Narragansett Indian Tribe of Rhode Island.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Patricia Capone, Repatriation Coordinator, Peabody Museum of Archaeology and Ethnology, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496–3702, before September 26, 2005. Repatriation of the human remains and associated funerary objects to the Narragansett Indian Tribe of Rhode Island may proceed after that date if no additional claimants come forward.

The Peabody Museum of Archaeology and Ethnology is responsible for notifying the Narragansett Indian Tribe of Rhode Island that this notice has been published.

Dated: July 22, 2005

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. 05–16881 Filed 8–24–05; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: University of Oregon Museum of Natural History, Eugene, OR, and U.S. Department of Defense, Army Corps of Engineers, Portland District, Portland, OR; Correction

AGENCY: National Park Service, Interior.

ACTION: Notice; correction.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects for which the University of Oregon Museum of Natural History, Eugene, OR, and the U.S. Department of Defense, Army Corps of Engineers, Portland District, Portland, OR, have joint responsibility. The human remains and associated funerary objects were removed from archeological sites on U.S. Army Corps of Engineers land located within the John Day Dam project area in Morrow County, OR, and Benton County, WA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

This notice corrects the number of human remains and associated funerary objects reported in a notice of inventory completion published in the **Federal Register** on October 8, 2003 (FR Doc. 03–25535, pages 58139–5140).

In June 2004, representatives of the cultural resources staff of the Confederated Tribes of the Umatilla Reservation, Oregon examined the faunal collections from sites 45 BN 64 (Eye site), 45 BN 77, 45 BN 81, and 35 MW 10 (Tom's Camp site), for human remains and associated funerary objects that might have been misidentified. The Collections Director and Physical Anthropologist for the University of Oregon Museum of Natural History examined the materials from the faunal collections that the Confederated Tribes of the Umatilla Reservation, Oregon identified for re-examination. The examination by the Collections Director and Physical Anthropologist identified human remains representing one additional individual and one associated funerary object from site 45 BN 81 and one associated funerary object from site 35 MW 10. In light of the findings from these examinations, the original notice of inventory is amended to include additions to the minimum number of individuals and associated funerary objects from 45 BN 81 site, and an addition of one associated funerary object for site 35 MW 10 (Tom's Camp).

The October 8, 2003 notice is corrected by substituting the following paragraphs:

The following paragraph is substituted for paragraph 11:

In 1963, human remains representing a minimum of two individuals were removed from site 45 BN 81 on Blalock Island, Benton County, WA, in the Columbia River within the John Day Dam project area. No known individuals were identified. The 72 associated funerary objects are 11 glass beads, 14 shell beads, 1 piece of copper, 1 copper button, 1 large maul, 3 points, 1 graver, 1 knife, 3 scrapers, 2 chert fragments, 23 flakes, 12 identified bones and 1 piece of charcoal.

The following paragraph is substituted for paragraph 13:

In 1967, human remains representing a minimum of two individuals were removed from the Tom's Camp site (35 MW 10), 3 miles west of the former town of Boardman, Morrow County, OR, on the south bank of the Columbia River, in the John Day Dam project area. No known individuals were identified. The one associated funerary object is a dentalium shell bead.

The following paragraph is substituted for paragraph 16:

Officials of the Army Corps of Engineers, Portland District have determined that, pursuant to 25 U.S.C. 3001(9–10), the human remains described above represent the physical remains of 21 individuals of Native American ancestry. Officials of the Army Corps of Engineers, Portland District also have determined that, pursuant to 25 U.S.C. 3001(3)(A), the 954 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Army Corps of Engineers, Portland District have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Confederated Tribes of the Umatilla Indian Reservation, Oregon.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Mr. Bert Rader, NAGPRA Coordinator, Environmental Resources Branch, U.S. Department of Defense, U.S. Army Corps of Engineers, Portland District, P.O. Box 2946, Portland, OR 97208–2946, telephone (503) 808–4766, before September 26, 2005. Repatriation of the human remains and associated funerary objects to the Confederated Tribes of the Umatilla Indian Reservation, Oregon may proceed after that date if no additional claimants come forward.

The Army Corp of Engineers, Portland District is responsible for notifying the Confederated Tribes of the Umatilla Indian Reservation, Oregon that this notice has been published.

Dated: July 26, 2005

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. 05–16883 Filed 8–24–05; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act

In accordance with Departmental Policy, 28 U.S.C. 50.7, notice is hereby given that on August 18, 2005, a proposed Consent Decree in *United States* v. *Cosmed Group, Inc.*, Civil Action No. 05353ML, was lodged with the United States District Court for the District of Rhode Island.

In this action the United States, on behalf of the United States Environmental Protection Agency (''EPA''), filed a complaint against Cosmed Group, Inc. (''Cosmed'') alleging various violations of the Clean Air Act and the Illinois State Implementation Plan, concerning Cosmed's current or former facilities in Coventry, RI, South Plainfield, NJ, Baltimore, MD, Waukegan, IL, Grand Prairie, TX, and San Diego, CA. Under the terms of the proposed settlement, Cosmed will pay a civil penalty of $500,000 million and fund Supplemental Environmental Projects providing environmental and public health benefits in and around Camden, NJ, Lake County, IL, Dallas, TX, and San Diego, CA at a cost of $1 million.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources

Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Cosmed Group, Inc.*, D.J. Ref. 90–5–2–1–08115.

The Consent Decree may be examined at the Office of the United States Attorney, District of Rhode Island, 50 Kennedy Plaza, 8th Floor, Providence, Rhode Island 02903, and at the United States Environmental Protection Agency, Region 1 (New England Region), One Congress Street, Boston, Massachusetts 02114. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html*. A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $23.75 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Ronald Gluck,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 05–16853 Filed 8–24–05; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Under 28 CFR 50.7, notice is hereby given that on August 8, 2005, a proposed Consent Decree in *United States* v. *Standard Detroit Paint Co., et al.*, Civil Action No. 04–71442 was lodged with the United States District Court for the Eastern District of Michigan.

In this action the United States sought reimbursement of response costs incurred for response actions taken at or in connection with the release or threatened release of hazardous substances at the Standard Detroit Paint Co. Site in Detroit, Michigan (''the Site''). The Consent Decree resolves the United States' claims against the defendants on an inability to pay basis. The defendants will pay the following amounts: (1) Bruce Gooel—$10,000; (2) SDPC, Inc.—$40,000; (3) Standard Detroit Realty Co.—50% of proceeds from transfer of all real property (estimated value to U.S.—$225,000); and (4) Riverside Organics—$14,000. Additionally, Riverside Products, the newly formed successor to Riverside Organics, shall submit a hazardous substance management plan to U.S. EPA for approval and shall comply with such management plan so long as it continues operations at the Site.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and shall refer to *United States* v. *Standard Detroit Paint Co., et al.*, D.J. Ref. 90–11–3–08271.

The Consent Decree may be examined at the Office of the United States Attorney, 211 W. Fort Street, Suite 2001, Detroit, MI and at U.S. EPA Region 5, 77 West Jackson Blvd., Chicago, IL. During the public comment period, the Consent Decree, may also be examined on the following Department of Justice Web site. *http://www.usdoj.gov/enrd/open.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood *(tonia.fleetwood@usdoj.gov)*, fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $5.25 (25 cents per page reproduction cost) payable to the U.S. Treasury.

William D. Brighton,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 05–16850 Filed 8–24–05; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980

Notice is hereby given that on August 2, 2005 a proposed Consent Decree in *United States* v. *Union Pacific Railroad Company*, an action under Sections 107 and 113 of the comprehensive Environmental Response, Compensation, and Liability Act of 1980 (''CERCLA''), as amended, 42 U.S.C. 9607 and 9613, was lodged with the United States District Court for the District of Utah, Case No. 2:05CV00650 BD (D. Utah).

In this action, the United States sought the recovery of costs incurred and to be incurred by the United States in response to releases or threatened releases of hazardous substances at and from the Eureka Mills NPL Site located in Eureka, Utah (the ''Site''). The United States alleged that the Union Pacific Railroad Company was liable under CERCLA Sections 106 and 107(a)(1) and (2), 42 U.S.C. 906 and 9607(a)(1) and (2), as a past owner of a portion of the Site at the time of disposal and as a present owner of a portion of the Site upon which hazardous substances have been released, for those response costs set forth in CERCLA Section 107(a)(4)(A)–(D), 42 U.S.C. 9607(a)(4)(A)–(D).

The settlement between the United States and the Union Pacific Railroad Company provides that the Union Pacific Railroad Company will implement the remedy for the Upper Eureka Gulch portion of the Site selected by the Environmental Protection Agency (''EPA'') for which the United States has alleged that the Union Pacific Railroad Company was responsible under CERCLA. The Union Pacific Railroad Company will also undertake certain quarry operations on-Site to produce rock and other borrow material needed by EPA for the 2005 and 2006 construction season. EPA estimates that the value of the work to be done by Union Pacific Railroad Company to be excess of $4.3 million. In addition, the Union Pacific Railroad Company will pay $270,690.00 into a special account to compensate EPA for anticipated future response costs.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Union Pacific Railroad Company*, DJ#90–11–3–07993/4.

The Consent Decree may be examined at U.S. EPA Region 8, 999 18th Street, Suite 500, Denver, Colorado, 80202. During the public comment period, the Consent Decree, may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia

Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $18.75 for the Decree (excluding appendices), $33.75 for the Decree with attachments payable to the United States Treasury.

Robert Brook,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 05–16852 Filed 8–24–05; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Settlement Pursuant to Section 122(h) of the Comprehensive Environmental Response, Compensation and Liability Act

Notice is hereby given that an agreement between the Department of the Interior, National Park Service and the Washington Gas Light Company has been approved, subject to public comment, by the Department of Justice pursuant to Section 122(h) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 *et seq.* The settlement provides for recovery of $285,000 in costs incurred by the Park Service in response to contamination on a portion of the National Capitol Parks-East, located beside the Anacostia River in Washington, DC.

For a period of thirty (30) days from the date of this publication, comments relating to the proposed settlement will be received. Such comments should be addressed to Shawn P. Mulligan, National Park Service, 1050 Walnut Street, Suite 220, Boulder, Colorado 80302, (303) 415–9014, or via e-mail at *Shawn_Mulligan@nps.gov* and should refer to the NPS Washington Gas Light Site.

A copy of the proposed settlement agreement may be obtained from, or reviewed at: National Capital Parks-East Headquarters, 1900 Anacostia Drive, SE., Washington, DC 20020, (202) 690–5185. In requesting a copy, please enclose a check in the amount of $2.75 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Robert Brook,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 05–16851 Filed 8–24–05; 8:45 am]

BILLING CODE 4410–15–M

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a current valid OMB control number.

1. *Type of submission, new, revision, or extension:* Extension.

2. *The title of the information collection:* 10 CFR Part 33—Specific Domestic Licenses of Broad Scope for Byproduct Material.

3. *The form number if applicable:* Not applicable.

4. *How often the collection is required:* There is a one-time submittal of information to receive a license. Once a specific license has been issued, there is a 10-year resubmittal of the information for renewal of the license.

5. *Who will be required or asked to report:* All applicants requesting a license of broad scope for byproduct material and all current licensees requesting renewal of a broad scope license.

6. *An estimate of the number of responses:* All of the information collections in Part 33 are captured under OMB clearance number 3150–0120 for NRC Form 313.

7. *The estimated number of annual respondents:* See item 6, above.

8. An estimate of the number of hours needed annually to complete the requirement or request: See item 6 above.

9. *An indication of whether Section 3507(d), Public Law 104–13 applies:* Not applicable.

10. *Abstract:* 10 CFR Part 33 contains mandatory requirements for the issuance of a broad scope license authorizing the use of byproduct material. The subparts cover specific requirements for obtaining a license of broad scope. These requirements include equipment, facilities, personnel, and procedures adequate to protect health and minimize danger to life or property.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F23, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by September 26, 2005. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

John Asalone, Office of Information and Regulatory Affairs (3150–0016), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be e-mailed to *John_A._Asalone@omb.eop.gov* or submitted by telephone at (202) 395–4650.

The NRC Clearance Officer is Brenda Jo Shelton, 301–415–7233.

Dated at Rockville, Maryland, this 18th day of August, 2005.

For the Nuclear Regulatory Commission.

Brenda Jo Shelton,

NRC Clearance Officer, Office of Information Services.

[FR Doc. E5–4648 Filed 8–24–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–346]

Firstenergy Nuclear Operating Company, Davis-Besse Nuclear Power Station, Unit 1; Notice of Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of FirstEnergy Nuclear Operating Company (the licensee) to withdraw its August 25, 2003, application for proposed amendment to Facility Operating License No. NPF–3; for the Davis-Besse Nuclear Power Station, Unit No. 1, located in Ottawa County, Ohio.

The proposed amendment would have revised the Technical Specifications (TSs) pertaining to the Steam and Feedwater Rupture Control System (SFRCS) instrumentation setpoints and surveillance intervals.

Specifically, the proposed amendment would have clearly identified the appropriate actions to be taken if an SFRCS instrumentation channel's output logic becomes inoperable; relocated the SFRCS instrumentation trip setpoints from the TSs to the Updated Safety Analysis Report; and decreased the SFRCS instrument channel functional test frequency from monthly to quarterly and made associated changes to the trip setpoint allowable values.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on September 30, 2003 (68 FR 56343). However, by letter dated August 9, 2005, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated August 25, 2003 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML032410076), as supplemented by letter dated June 4, 2004 (ADAMS Accession No. ML041610286), and the licensee's letter dated August 9, 2005 (ADAMS Accession No. ML052230259), which withdrew the application for license amendment. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area 01 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams/html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737 or by email to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 18th day of August 2005.

For the Nuclear Regulatory Commission.

William A. Macon, Jr.,

Project Manager, Section 2, Project Directorate III, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. E5–4646 Filed 8–24–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Draft Regulatory Guide: Issuance, Availability

The U.S. Nuclear Regulatory Commission (NRC) has issued for public comment a draft revision to an existing guide in the agency's Regulatory Guide Series. This series has been developed to describe and make available to the public such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

The draft Revision 4 of Regulatory Guide 1.97, entitled ''Criteria for Accident Monitoring Instrumentation for Nuclear Power Plants,'' is temporarily identified by its task number, DG–1128, which should be mentioned in all related correspondence. Like its predecessors, this proposed revision describes a method that the NRC staff considers acceptable for use in complying with the agency's regulations with respect to satisfying criteria for accident monitoring instrumentation in nuclear power plants. Specifically, the method described in this regulatory guide relates to General Design Criteria 13, 19, and 64, as set forth in Appendix A to Title 10, Part 50, of the Code of Federal Regulations (10 CFR Part 50), ''Domestic Licensing of Production and Utilization Facilities.''

This proposed revision of Regulatory Guide 1.97 represents an ongoing evolution in the nuclear industry's thinking and approaches with regard to accident monitoring systems for the Nation's nuclear power plants. Specifically, this revision endorses (with certain clarifying regulatory positions specified in Section C of Draft Regulatory Guide DG–1128) the ''Criteria for Accident Monitoring Instrumentation for Nuclear Power Generating Stations,'' which the Institute of Electrical and Electronics Engineers (IEEE) promulgated as IEEE Std. 497–2002.

This revised regulatory guide is intended for licensees of new nuclear power plants.[1] Previous revisions of this regulatory guide remain in effect for licensees of current operating reactors,[1] who are unaffected by this proposed revision. However, licensees of current operating reactors may voluntarily convert their entire accident monitoring program to the criteria in this proposed revision.

The NRC staff is soliciting comments on Draft Regulatory Guide DG–1128, and comments may be accompanied by relevant information or supporting data. Please mention DG–1128 in the subject line of your comments. Comments on this draft regulatory guide submitted in writing or in electronic form will be made available to the public in their entirety through the NRC's Agencywide Documents Access and Management System (ADAMS). Personal information will not be removed from your comments. You may submit comments by any of the following methods.

Mail comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Email comments to: *NRCREP@nrc.gov*. You may also submit comments via the NRC's rulemaking Web site at *http://ruleforum.llnl.gov*. Address questions about our rulemaking Web site to Carol A. Gallagher (301) 415–5905; e-mail *CAG@nrc.gov*.

Hand-deliver comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

Fax comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission at (301) 415–5144.

Requests for technical information about Draft Regulatory Guide DG–1128 may be directed to George M. Tartal at (301) 415–0016 or by email to *GMT1@nrc.gov*.

Comments would be most helpful if received by October 14, 2005. Comments received after that date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

Electronic copies of the draft regulatory guide are available through the NRC's public Web site under Draft Regulatory Guides in the Regulatory Guides document collection of the NRC's Electronic Reading Room at

[1] The terms ''new nuclear power plant'' and ''new plant'' refer to any nuclear power plant for which the licensee obtained an operating license after the NRC issued Revision 4 of Regulatory Guide 1.97. The terms ''current operating reactor'' and ''current plant'' refer to any nuclear plant for which the licensee obtained an operating license before the NRC issued Revision 4 of Regulatory Guide 1.97.

http://www.nrc.gov/reading-rm/doc-collections/. Electronic copies are also available in the NRC's Agencywide Documents Access and Management System (ADAMS) at *http://www.nrc.gov/reading-rm/adams.html*, under Accession #ML052150210. Note, however, that the NRC has temporarily limited public access to ADAMS so that the agency can complete security reviews of publicly available documents and remove potentially sensitive information. Please check the NRC's Web site for updates concerning the resumption of public access to ADAMS.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR), which is located at 11555 Rockville Pike, Rockville, Maryland; the PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4205, by fax at (301) 415–3548, and by e-mail to *PDR@nrc.gov*. Requests for single copies of draft or final guides (which may be reproduced) or for placement on an automatic distribution list for single copies of future draft guides in specific divisions should be made in writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Reproduction and Distribution Services Section; by e-mail to *DISTRIBUTION@nrc.gov*; or by fax to (301) 415–2289. Telephone requests cannot be accommodated.

Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them. (5 U.S.C. 552(a))

Dated at Rockville, Maryland, this 15th day of August, 2005.

For the Nuclear Regulatory Commission.

Richard J. Barrett,

Director, Division of Engineering Technology, Office of Nuclear Regulatory Research.

[FR Doc. E5–4647 Filed 8–24–05; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 1–32255]

Issuer Delisting; Notice of Application of GuruNet Corporation To Withdraw Its Common Stock, $.001 Par Value, From Listing and Registration on the American Stock Exchange LLC

August 19, 2005.

On July 27, 2005, GuruNet Corporation, a Delaware corporation (''Issuer''), filed an application with the Securities and Exchange Commission (''Commission''), pursuant to Section 12(d) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its common stock, $.001 par value (''Security''), from listing and registration on the American Stock Exchange LLC (''Amex'').

On March 23, 2005, the Board of Directors (''Board'') of the Issuer approved a resolution to withdraw the Security from listing and registration on Amex and to list the Security on the Nasdaq National Market (''Nasdaq''). The Board stated that the Issuer's Investor Relations department had received a very significant amount of feedback from investors who would prefer the Security be traded on Nasdaq rather than Amex. The Issuer stated that the last day of trading on Amex was August 1, 2005.

The Issuer stated that it has met the requirements of Amex's rules governing an issuer's voluntary withdrawal of a security from listing and registration by complying with all the applicable laws in effect in Delaware, in which it is incorporated.

The Issuer's application relates solely to the withdrawal of the Security from listing on Amex and from registration under Section 12(b) of the Act,[3] and shall not affect its obligation to be registered under Section 12(g) of the Act.[4]

Any interested person may, on or before September 9, 2005, comment on the facts bearing upon whether the application has been made in accordance with the rules of Amex, and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/delist.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include the File Number 1–32255 or;

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number 1–32255. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–4651 Filed 8–24–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 1–03427]

Issuer Delisting; Notice of Application of Hilton Hotels Corporation To Withdraw Its Common Stock, $2.50 Par Value, From Listing and Registration on the Pacific Exchange, Inc.

August 19, 2005.

On August 3, 2005, Hilton Hotels Corporation, a Delaware corporation (''Issuer''), filed an application with the Securities and Exchange Commission (''Commission''), pursuant to Section 12(d) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its common stock, $2.50 par value (''Security''), from listing and registration on the Pacific Exchange, Inc. (''PCX'').

The Board of Directors (''Board'') of the Issuer approved resolutions on May 26, 2005 to withdraw the Security from listing on PCX. The Issuer stated that the following reasons factored into the Board's decision to withdraw the Security from PCX: (i) The Security is currently traded on the New York Stock Exchange, Inc. (''NYSE''), the Issuer's principal listing exchange; (ii) PCX has adopted corporate governance and disclosure policies and requirements that are different from the policies and requirements adopted by NYSE; and (iii) the elimination of duplicate corporate

[1] 15 U.S.C. 78*l*(d).
[2] 17 CFR 240.12d2–2(d).
[3] 15 U.S.C. 78*l*(b).
[4] 15 U.S.C. 78*l*(g).
[5] 17 CFR 200.30–3(a)(1).
[1] 15 U.S.C. 78*l*(d).
[2] 17 CFR 240.12d2–2(d).

government disclosure policies and requirements of national securities exchanges applicable to the Issuer.

The Issuer stated in its application that it has complied with applicable rules of PCX Rule 5.4(b) by complying with all applicable laws in effect in the State of Delaware, the state in which the Issuer is incorporated, and by providing PCX with the required documents governing the withdrawal of securities from listing and registration on PCX. The Issuer's application relates solely to the withdrawal of the Securities from listing on PCX and shall not affect its continued listing on NYSE or its obligation to be registered under Section 12(b) of the Act.[3]

Any interested person may, on or before September 9, 2005 comment on the facts bearing upon whether the application has been made in accordance with the rules of PCX, and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

Electronic Comments

- Send an e-mail to *rule-comments@sec.gov*. Please include the File Number 1–03427 or;

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number 1–03427. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

[3] 3 15 U.S.C. 78*l*(b).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–4652 Filed 8–24–05; 8:45 a.m.]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–28017]

Filings Under the Public Utility Holding Company Act of 1935, as Amended (''Act'')

August 19, 2005.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by September 13, 2005, to the Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After September 13, 2005, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

CNG Holdings, Inc. (70–10288)

CNG Holdings, Inc. (''Holdings''), an exempt holding company, 7810 Shaffer Parkway, Suite 120, Littleton, CO 80127, has filed with this Commission an application/declaration under Sections 3(a)(1), 9(a)(2) and 10 of the Act (''Application'').

Holdings seeks authority to acquire the common stock of Missouri Gas Utility, Inc. (''MGU''). In addition, Holdings seeks an order granting it an exemption under Section 3(a)(1) of the Act.

Holdings is a Colorado corporation, currently claiming exemption from registration under the Act by Rule 2. Holdings' direct wholly owned subsidiary, Colorado Natural Gas, Inc. (''CNG''), a Colorado Corporation, is a gas public utility serving approximately 6,300 retail customers in Colorado. CNG is regulated by the Colorado Public Utilities Commission. As of December 31, 2004, CNG had 1,950,432 feet of gas main lines and 2,779,770 feet of service lines, located in the Colorado counties of Park, Jefferson, Clear Creek, Teller, Gilpin and Pueblo. CNG sells no gas (or electricity) outside Colorado.

As of and for the year ended December 31, 2004, Holdings' consolidated gross operating revenues, net income and net assets were approximately $5,204,464, $596,678 and $42,062,036, respectively. For the same period, CNG's gross operating revenues, net operating revenues, net income and net assets were approximately $4,390,757, $2,185,894, $558,403 and $39,437,935, respectively.

Holdings also is engaged in certain non-utility businesses. Its wholly owned subsidiary, Colorado's Best Heating and Appliances, LLC, is a Colorado limited liability company engaged in the conversion of propane appliances to use natural gas fuel. Wolf Creek Energy, LLC, a Colorado limited liability company and a wholly owned direct subsidiary of Holdings, is engaged in the brokerage and sale of commodity gas to an industrial customer in Colorado. Wolf Creek Energy does not own facilities for the distribution of gas for sale.

MGU is a Colorado corporation which owns and operates a natural gas distribution system (the ''utility assets'') serving approximately 740 customers in the cities of Gallatin and Hamilton, Missouri, and surrounding communities. As of December 31, 2004, MGU had 554,400 feet of gas main lines and 111,000 feet of service lines, located in the Missouri counties of Caldwell, Davies and Harrison. For the nine months ended December 31, 2004, MGU had no gross operating revenues, and only $362 of interest income. MGU's net assets as of December 31, 2004 were $2,320,878. MGU does not conduct any nonutility businesses and the company has no subsidiaries.

MGU is subject to the regulation of the Public Service Commission of the State of Missouri (''MPSC'') with regard to rates, quality of service, affiliate transactions and other matters. The MPSC authorized MGU to acquire the

[4] 17 CFR 200.30–3(a)(1).

utility assets by order dated December 14, 2004.

Holdings seeks authority to acquire all of the issued and outstanding common stock of MGU. The transaction is structured as a stock-for-stock exchange at a ratio of 25:1 in which the current shareholders of MGU would exchange the 57,590 outstanding common shares of MGU for 2,303 common shares of Holdings. As of December 31, 2004, Holdings had 1,424,663 shares of common stock issued and outstanding. The acquisition of MGU would increase the number of Holdings shares outstanding to 1,426,966 shares.

The municipalities of Gallatin and Hamilton, Missouri had initially operated the gas utility assets now owned by MGU. The municipalities financed the construction of the assets through a lease transaction. When the municipalities defaulted on their lease obligations, the trustee, acting on behalf of the lenders, sought to sell the assets. Pursuant to a sale authorized by the Missouri Public Service Commission in December 2004, MGU acquired the gas distribution system in Gallatin and Hamilton for an aggregate consideration of $1.9 million, plus counsel and bank fees of approximately $46,000. MGU financed the acquisition with bank financing in the amount of $2 million, backed by a guarantee from Holdings. CNG did not provide any financing for MGU's acquisition of the assets, nor did it guarantee the loan.

Upon consummation of the acquisition, MGU would be a wholly-owned direct subsidiary of Holdings. Holdings requests that the Commission issue an order authorizing the acquisition and exempting Holdings, under Section 3(a)(1), from all provisions of the Act, except Section 9(a)(2). In support of its request for an order of exemption, Holdings asserts that (i) MGU is not a material public utility subsidiary, (ii) after the acquisition, Holdings and CNG will both be organized in Colorado, and (iii) both Holdings and CNG also will be predominantly intrastate in character and carry on their business substantially in Colorado. In support of its request for approval of the acquisition, Holdings submits that the combined utility operations will be a single integrated public utility system, operating in a single area or region.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland

Deputy Secretary.

[FR Doc. E5–4649 Filed 8–24–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

In the Matter of Global Development and Environmental Resources, Inc., Order of Suspension of Trading

August 23, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Global Development and Environmental Resources, Inc. (''Global Development''), a non-reporting issuer quoted on the Pink Sheets under the ticker symbol GDVE. Questions have been raised regarding the accuracy of information in company press releases and on the internet concerning Global Development's officers, operations and products.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to section 12(k) of the Securities Exchange Act of 1934, that trading in the above-listed company is suspended for the period from 9:30 a.m. EDT August 23, 2005 through 11:59 p.m. EDT, on September 6, 2005.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 05–17001 Filed 8–23–05; 12:05 pm]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52298; File No. R–Amex–2004–47]

Self-Regulatory Organizations; American Stock Exchange LLC; Order Granting Approval to Proposed Rule Change and Amendment No. 1 Thereto, and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 Thereto, Relating to Listing and Trading of Yield Underlying Participating Securities (YUPS)

August 18, 2005.

I. Introduction

On June 10, 2004, the American Stock Exchange LLC (''Amex'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to approve for listing and trading Yield Underlying Participating Securities (''YUPS''), representing a beneficial ownership interest in the common stock of a single, publicly-traded company and a series of U.S. Treasury Securities with quarterly maturities. On April 15, 2005, Amex filed Amendment No. 1 to the proposed rule change. The proposed rule change and Amendment No. 1 thereto were published for comment in the **Federal Register** on April 22, 2005.[3]

The Commission received no comments on the proposal. This order approves the proposed rule change, as amended by Amendment No. 1. Simultaneously, the Commission provides notice of filing of Amendment No. 2 to the proposed rule change and grants accelerated approval of Amendment No. 2.[4]

YUPS will be eligible for listing and trading, including trading pursuant to unlisted trading privileges, pursuant Commentary .03(a)–(f) of Rule 1202.[5] YUPS will also be subject to Commentary .13 to Amex Rule 170,[6] which allows a limited exception for specialist in Single TIRs, including the YUPS, to buy on plus ticks and/or sell on minus ticks to bring the Single TIR/YUPS into parity with the underlying securities. YUPS will not qualify for side-by-side trading and integrated market making as set forth in Amex Rule 175(c)(2) and 985(e),[7] under Commentary .05 to Amex Rule 1202. Furthermore, YUPS will be subject to Commentary .06 to Amex Rule 1202, regarding trading halts, and Commentary .07 to Amex Rule 1202, regarding allowable percentages set forth in Section 107B of the Amex Company Guide (''Company Guide'').[8]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 51566 (April 18, 2005), 70 FR 20946 (''YUPS Notice'').

[4] On August 16, 2005, the Exchange submitted Amendment No. 2 to the proposed rule change.

[5] The listing standards for YUPS described herein were originally incorporated in a separate proposal for generic listing standards for trust issued receipts based on a single underlying listed security (''Single TIRs''). *See* Securities Exchange Act Release No. 51567 (April 18, 2005), 70 FR 20939 (April 22, 2005) (''Single TIR Proposal''). Following Amex's withdrawal of the Single TIR Proposal, Amex submitted Amendment No. 2 to this proposed rule change to incorporate those same listing standards solely for YUPS products. Therefore, in this order, the Commission is only approving the listing and trading of the YUPS-type product, which represents beneficial ownership interests in the common stock of a single publicly traded company and a series of U.S. Treasury securities with quarterly maturities.

[6] This new Commentary .13 to Amex Rule 170 was proposed in the Single TIR Proposal.

[7] *See* Single TIR Proposal.

[8] *See* Single TIR Proposal.

II. Discussion and Commission Findings

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[9] and, in particular, the requirements of Section 6 of the Act[10] and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change is consistent with Section 6(b)(5) of the Act,[11] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission finds good cause for approving proposed Amendment No. 2 before the 30th day after the date of publication of notice of filing thereof in the **Federal Register**. Amex filed Amendment No. 2 solely for the purpose of incorporating generic listing standards pursuant to Rule 19b–4(e)[12] for YUPS. The generic listing standards proposed in Amendment No. 2 were previously noticed in the separately proposed Single TIR proposal,[13] and incorporated by reference in the YUPS notice.[14] Amex has recently withdrawn the Single TIR proposal. In order to retain the generic listing standards for the YUPS product, Amex submitted Amendment No. 2 to this proposed rule change, to incorporate those standards as part of this proposed rule change. Because the generic listing standards proposed in Amendment No. 2 were already published in the **Federal Register** as part of the Single TIR proposal and because no comments were received on the Single TIR proposal, the Commission finds good cause for accelerating approval of Amendment No. 2 in order to prevent any unnecessary delay in the approval of this proposed rule change in its entirety.

[9] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78f.

[11] 15 U.S.C. 78f(b)(5).

[12] 17 CFR 240.19b–4(e).

[13] *See* Single TIR proposal.

[14] *See* YUPS Notice.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 2 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Amex–2004–47 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–Amex–2004–47. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Amex–2004–47 and should be submitted on or before September 15, 2005.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[15] that the proposed rule change (SR–Amex–2004–47), as amended by Amendment No. 1, be, and it hereby is, approved, and that Amendment No. 2 to the proposed rule change be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–4638 Filed 8–24–05; 8:45 am]

BILLING CODE 8010–01–P

[15] 15 U.S.C. 78s(b)(2).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52303; File No. SR–NASD–2005–057]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change Relating to Summary Orders in the Nasdaq Market Center

August 18, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 22, 2005, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to allow all eligible market participants in the Nasdaq Market Center to enter attributable and non-attributable Summary Orders in Nasdaq-listed and exchange-listed securities. Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in [brackets].

* * * * *

4700. NASDAQ MARKET CENTER—EXECUTION SERVICES

4701. Definitions

Unless stated otherwise, the terms described below shall have the following meaning:

(a)–(nn) No Change.

(oo) The term ''Summary'' shall mean, for priced limit orders so designated,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

that if an order is marketable upon receipt by the Nasdaq Market Center, it shall be rejected and returned to the entering party. [Summary Orders may only be entered by Nasdaq Order-Delivery ECNs.]

(pp)–(uu) No Change.

* * * * *

4706. Order Entry Parameters

(a) Non-Directed Orders—

(1) General. The following requirements shall apply to Non-Directed Orders Entered by Nasdaq Market Center Participants:

(A) No Change.

(B) A Non-Directed Order must be a market or limit order, must indicate whether it is a buy, short sale, short-sale exempt, or long sale, and may be designated as ''Immediate or Cancel'', ''Day'', ''Good-till-Cancelled'', ''Auto-Ex'', ''Fill or Return'', ''Pegged'', ''Discretionary'', ''Sweep'', ''Total Day'', ''Total Good till Cancelled'', or ''Total Immediate or Cancel,'' or ''Summary.''

(i)–(xii) No Change.

(xiii) An order may be designated as ''Summary,'' in which case the order shall be designated either as Day or GTC. A Summary Order that is marketable upon receipt by the Nasdaq Market Center shall be rejected and returned to the entering party. If not marketable upon receipt by the Nasdaq Market Center, it will be retained by the system. [Summary Orders may only be entered by Nasdaq Order-Delivery ECNs.]

(C)–(F) No Change.

(2) No Change.

(b)–(e) No Change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is proposing to allow all participants in the Nasdaq Market Center to enter attributable and non-attributable Summary Orders, and to make Summary Orders available for exchange-listed securities. Nasdaq represents that, today, Summary Orders in essence provide a warning that the price of the order in a Nasdaq security would lock or cross the best prices then displayed in the Nasdaq Market Center by rejecting such an order back to the entering party. If the Summary Order does not lock or cross the best price, it is retained by the system for normal processing. The use of Summary Orders is currently restricted to Nasdaq Order Delivery ECNs. Approval of this proposal would give all Nasdaq Market Center participants the ability to enter such orders on either an attributable, or non-attributable, basis and make Summary Orders available for exchange-listed securities.

Nasdaq represents that, under current Nasdaq Market Center processing, quotes already provide the lock/cross warning via rejection attributes of the Summary Order. Orders that are not designated as Summary, however, do not provide similar lock/cross warning capabilities and are considered immediately executable indications of trading interest that would be executed by the system if they locked or crossed the Nasdaq inside market.

Nasdaq believes that the ability to receive a warning via order rejection when entering a locking or crossing order is an important component in enhancing Nasdaq market participants' control over how their orders are processed in the Nasdaq Market Center. Nasdaq represents that, through the availability of the Summary Order lock/cross warning, market participants can themselves determine if they desire to immediately execute against available trading interest, or instead provide liquidity via a posted order. Nasdaq believes that this control is especially important in today's trading environment, where smaller spreads accentuate transaction costs. Such costs can be minimized by being a provider of liquidity that, in some cases, entitles the submitting party to an execution fee rebate, thereby reducing overall transaction costs. As noted above, lock or cross warnings similar to those provided by the Summary Order are available today to Nasdaq market participants that use quotes when representing trading interest in the Nasdaq Market Center. By also making lock/cross warnings via order rejection an option for orders entered by market participants, Nasdaq believes that the ability of market participants would be enhanced to obtain better, more economically efficient executions for themselves and their customers.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[3] in general, and with Section 15A(b)(6) of the Act,[4] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, Nasdaq believes that the increased control given to all market participants through the use of Summary Orders would assist in improving execution quality for themselves and their customers. In addition, to the extent that expansion of the Summary Order to attributable orders encourages the submission of greater amounts of trading interest in the form of such orders into the Nasdaq Market Center, Nasdaq believes that all market participants can be expected to benefit from such increased system liquidity.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which Nasdaq consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing,

[3] 15 U.S.C. 78*o*–3.

[4] 15 U.S.C. 78*o*–3(b)(6).

including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASD–2005–057 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–NASD–2005–057. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2005–057 and should be submitted on or before September 15, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–4637 Filed 8–24–05; 8:45 am]

BILLING CODE 8010–01–P

[5] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52280; File No. SR–NASD–2005–095]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of a Proposed Rule Change and Amendment No. 1 Thereto Relating to Sub-Penny Restrictions for Non-Nasdaq Over-the-Counter Equity Securities

August 17, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 28, 2005, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III, which Items have been prepared by NASD. On August 16, 2005, NASD submitted Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD is proposing to amend NASD Rule 6750 to impose restrictions on the display of quotes and orders in sub-penny increments for non-Nasdaq OTC equity securities. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

6750. [Minimum] Quotation [Size] Requirements for OTC Equity Securities

(a) No change.

(b) No member shall display, rank, or accept a bid or offer, an order, or an indication of interest in any OTC Equity Security priced in an increment smaller than $0.01 if that bid or offer, order or indication of interest is priced equal to or greater than $1.00 per share.

(c) No member shall display, rank, or accept a bid or offer, an order, or an indication of interest in any OTC Equity Security priced in an increment smaller than $0.0001 if that bid or offer, order or indication of interest is priced equal to or greater than $0.01 per share and less than $1.00 per share.

[(b)]*(d)* For purposes of this Rule, the term ''OTC Equity Security'' means any equity security not classified as a ''designated security'' for purposes of the Rule 4630 and 4640 Series, or as an ''eligible security,'' for purposes of the Rule 6400 Series. The term does not include ''restricted securities,'' as defined by SEC Rule 144(a)(3) under the Securities Act of 1933, nor any securities designated in the PORTAL Market[SM].

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASD is proposing a rule change that would prohibit the accepting, ranking, or displaying of quotes, orders, or indications of interest in sub-penny increments for all non-Nasdaq OTC equity securities in any quotation medium,[4] except for quotes, orders, and indications of interest priced at less than $1.00 per share. NASD believes that the existing quotation environment, in which market participants use quotation increments ranging from pennies to hundredths of pennies, can harm investors by creating a two-tiered market, one for ordinary investors and another for professionals, undermining important Commission and self-regulatory organization policy objectives. The potential harm associated with sub-penny quoting in national market stocks is described in the Commission's Proposing Release and Adopting Release for Regulation NMS,[5] and, in NASD's view, essentially

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, NASD made minor clarification to the proposed rule text, corrected typographical errors, and changed the proposed compliance date for the rule change.

[4] ''Quotation medium'' is defined in NASD Rule 6710(f) and includes, among others, the Over-the-Counter Bulletin Board and the Electronic Pink Sheets.

[5] *See* Securities Exchange Act Release No. 49325 (February 26, 2004), 69 FR 11126 (March 9, 2004) (Proposing Release); Securities Exchange Act Release No. 50870 (December 16, 2004), 69 FR 77423 (December 27, 2004) (Reproposing Release);

Continued

the same potential problems exist with respect to OTC equity securities.

Accordingly, NASD is proposing a rule change that would prohibit members from displaying, ranking, or accepting a bid, offer, order, or indication of interest in any non-Nasdaq OTC equity security in any quotation medium priced in an increment smaller than $0.01 if such bid, offer, order, or indication of interest is priced equal to or greater than $1.00 per share. In addition, members also would be prohibited from displaying, ranking, or accepting a bid, offer, order, or indication of interest in any non-Nasdaq OTC Equity Security priced in an increment smaller than $0.0001 if such bid, offer, order, or indication of interest is priced equal to or greater than $0.01 per share and less than $1.00 per share. This is consistent with the sub-penny requirements in Regulation NMS. However, unlike Regulation NMS, members would not be prohibited from displaying, ranking, or accepting a bid, offer, order, or indication of interest in any non-Nasdaq OTC equity security priced in an increment smaller than $0.0001 if such bid, offer, order, or indication of interest is priced less than $0.01 per share. This reflects the fact that it is not uncommon for non-Nasdaq OTC equity securities to trade at prices below $0.01, and the proposal is not intended to restrict quoting or trading of such securities.

If the Commission approves this proposed rule change, NASD would announce the effective date of the proposed rule change in a *Notice to Members* to be published no later than 60 days following Commission approval. The compliance date of the proposed rule change will coincide with the compliance date of Rule 612 (''the Sub-Penny Rule'') under Regulation NMS,[6] assuming Commission approval of the proposed rule change prior to that date. NASD will announce the compliance date of the proposed rule change in a *Notice to Members* to be published no later than 60 days following Commission approval.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[7] which requires, among other things, that NASD rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change would reduce the potential harms associated with sub-penny quoting in non-Nasdaq OTC equity securities.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *http://www.sec.gov/rules/sro.shtml;* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASD–2005–095 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–NASD–2005–095. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to the File Number SR–NASD–2005–095 and should be submitted on or before September 15, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–4650 Filed 8–24–05; 8:45 am]

BILLING CODE 8010–01–P

Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (Adopting Release). Regulation NMS, among other things, prohibits market participants from accepting, ranking, or displaying orders, quotes, or indications of interest in NMS stocks in a pricing increment finer than a penny, except for orders, quotations, or indications or interest that are priced at less than $1.00 per share. In Regulation NMS, the Commission indicated that other potential harms associated with sub-penny quoting include a decrease in market depth, an increase in the incidence of market participants stepping ahead of standing limit orders for an economically insignificant amount, and added difficultly for broker-dealers to meet certain of their regulatory obligations by increasing the incidence of so-called ''flickering'' quotes. Further, the Commission expressed concern that sub-penny quotes could impair broker-dealers' efforts to meet their best execution obligations and interfere with investors' understanding of securities prices.

[6] Currently, the compliance date of the Sub-Penny Rule under Regulation NMS is January 31, 2006. *See* Securities Exchange Act Release No. 52196 (Aug. 2, 2005), 70 FR 45529 (Aug. 8, 2005).

[7] 15 U.S.C. 78*o*–3(b)(6).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52308; File No. SR–NYSE–2004–73]

Self-Regulatory Organizations; New York Stock Exchange, Inc., Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto To Amend NYSE Rule 440A Relating to Telephone Solicitation

August 19, 2005.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Exchange Act''),[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 30, 2004, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On July 1, 2005, the NYSE filed Amendment No. 1 to the proposed rule change.[4] On August 11, 2005, the NYSE filed Amendment No. 2 to the proposed rule change.[5] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend NYSE Rule 440A (''Telephone Solicitation'') to incorporate the national Do-Not-Call Registry and applicable FCC regulations. The text of current Rule 440A would be deleted. The text of the proposed rule change is set forth below. *Italics* indicate new text.

* * * * *

Rule 440A

Telephone Solicitation

(a) General Telephone Solicitation Requirements

No member, allied member or employee of a member or member organization shall initiate any telephone solicitation, as defined in paragraph (j)(2) of this rule, to:

(1) Time of Day Restriction

Any residence of a person before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), unless

(A) the member or member organization has an established business relationship with the called party pursuant to paragraph (j)(1)(A),

(B) the member or member organization has received the called party's prior express invitation or permission, or

(C) the called party is a broker or dealer;

(2) Firm-Specific Do-Not-Call List

Any person that previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the member or member organization; or

(3) National Do-Not-Call List

Any person who has registered his or her telephone number on the Federal Trade Commission's national do-not-call registry.

(b) Procedures

Prior to engaging in telephone solicitation or telemarketing, a member or member organization must institute procedures to comply with paragraph (a). Such procedures must meet the following minimum standards:

(1) Written policy. Members and member organizations must have a written policy available upon demand for maintaining a do-not-call list.

(2) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list, including the policies and procedures of the firm regarding communications with the public.

(3) Recording, honoring of do-not-call requests. If a member or member organization making a call for telemarketing purposes receives a request from a person not to receive calls from that member or member organization, the member or member organization must record the request and place the person's name, if provided, and telephone number on the firm's do-not-call list at the time the request is made. Members and member organizations must honor a person's do-not-call request within a reasonable time from the date such request is made. This period may not exceed 30 days from the date of such request. If such requests are recorded or maintained by a party other than the member or member organization on whose behalf the telemarketing call is made, the member or member organization on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request.

(4) Identification of sellers and telemarketers. A member, allied member or employee of a member or member organization making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the member or member organization, an address or telephone number at which the member or member organization may be contacted, and that the purpose of the call is to solicit the purchase or sale of securities or a related service. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(5) Affiliated persons or entities. In the absence of a specific request by the person to the contrary, a person's do-not-call request shall apply to the member or member organization making the call, and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product or service being advertised.

(6) Maintenance of do-not-call lists. A member or member organization making calls for telemarketing purposes must maintain a record of a caller's request not to receive further telemarketing calls. A firm-specific do-not-call request must be honored for five years from the time the request is made.

(c) National Do-Not-Call List Exceptions

Paragraph (a)(3) national do-not-call list restrictions shall not apply, if:

(1) Established Business Relationship Exception

The member or member organization has an established business relationship with the recipient of the call. A person's request to be placed on the firm-specific do-not-call list terminates the established business relationship exception to that national do-not-call list provision for that member or member organization even if the person continues to do business with the member or member organization;

(2) Prior Express Written Consent Exception

The member or member organization has obtained the person's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the person and member or member organization which states that the person agrees to be contacted by the member or member organization and

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[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a *et seq.*

[3] 17 CFR 240.19b-4.

[4] In Amendment No. 1, the NYSE proposed to partially amend the text of proposed amended Rule 440A and made conforming and technical changes to the original filing.

[5] In Amendment No. 2, the NYSE proposed additional changes to the text of proposed amended Rule 440A and made additional changes to the original filing.

includes the telephone number to which the calls may be placed; or

(3) Personal Relationship Exception

The member, allied member or employee of a member or member organization making the call has a personal relationship with the recipient of the call.

(d) Safe Harbor Provision

Paragraph (a)(3) general telephone solicitation restrictions shall not apply to a member or employee of a member or member organization making telephone solicitations, if the member or employee of a member or member organization demonstrates that the violation is the result of an error and that as part of the member or member organization's routine business practice, it meets the following standards:

(1) Written procedures. The member or member organization has established and implemented written procedures to comply with the national do-not-call rules;

(2) Training of personnel. The member or member organization has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(3) Recording. The member or member organization has maintained and recorded a list of telephone numbers that it may not contact; and

(4) Accessing the national do-not-call database. The member or member organization uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process.

(e) Pre-Recorded Messages

(1) A member or member organization may not initiate any telephone call to any residence using an artificial or prerecorded voice to deliver a message, without the prior express consent of the called person, unless the call:

(i) is not made for a commercial purpose;

(ii) is made for a commercial purpose, but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation; or

(iii) is made to any person with whom the member or member organization has an established business relationship at the time the call is made.

(2) All artificial or prerecorded telephone messages shall:

(i) At the beginning of the message, state clearly the identity of the member or member organization that is responsible for initiating the call. The member or member organization responsible for initiating the call must state the name under which the member or member organization is registered to conduct business with the applicable State Corporation Commission (or comparable regulatory authority); and

(ii) During or after the message, must state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such member or member organization. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(iii) For telemarketing messages to a residence, such telephone number, mentioned in paragraph (e)(2)(ii) above, must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign.

(f) Wireless Communications

(1) Members and member organizations are prohibited from using an automatic telephone dialing system or an artificial or prerecorded voice when initiating a telephone call to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

(2) The requirements of this rule are applicable to members and member organizations telemarketing or making telephone solicitation calls to wireless telephone numbers.

(g) Telephone Facsimile or Computer Advertisements

No member or member organization may use a telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine, computer or other device.

(1) For purposes of paragraph (g) of this rule, a facsimile advertisement is not ''unsolicited'' if the recipient has granted the member or member organization prior express invitation or permission to deliver the advertisement. Such express invitation or permission must be evidenced by a signed, written statement that includes the facsimile number to which any advertisements may be sent and clearly indicates the recipient's consent to receive such facsimile advertisements from the member or member organization.

(2) Members and member organizations must clearly mark, in a margin at the top or bottom of each page of the transmission, the date and time it is sent and an identification of the member or member organization sending the message and the telephone number of the sending machine or of the member or employee of the member or member organization sending the transmission.

(h) Caller Identification Information

(1) Any member or member organization that engages in telemarketing, as defined in paragraph (j)(2) of this rule, must transmit caller identification information. Such caller identification information must include either the Calling Party Number (''CPN'') or the calling party's billing number, also known as the Charge Number (''ANI''), and, when available from the telephone carrier, the name of the member or member organization. The telephone number so provided must permit any person to make a do-not-call request during regular business hours. Whenever possible, CPN is the preferred number and should be transmitted.

(2) Any member or member organization that engages in telemarketing, as defined in paragraph (j)(2) of this rule, is prohibited from blocking the transmission of caller identification information.

(3) Provision of caller identification information does not obviate the requirement for a caller to verbally supply identification information during a call.

(i) Outsourcing Telemarketing

If a member or member organization uses another entity to perform telemarketing services on its behalf, the member or member organization remains responsible for ensuring compliance with all provisions contained in this rule.

(j) Definitions

(1) Established Business Relationship

(A) An established business relationship means a prior or existing relationship formed by a voluntary two-way communication between a member or member organization and a person, with or without an exchange of consideration, if:

(i) the person has made a financial transaction or has a securities position, a money balance, or account activity with the member or member organization, or at a clearing firm that provides clearing services to such member or member organization, within the previous 18 months immediately preceding the date of the telephone call;

(ii) the member or member organization is the broker-dealer of record for an account of the person within the previous 18 months immediately preceding the date of the telephone call; or

(iii) the person has contacted the member or member organization to inquire about, or make an application regarding a product or service offered by the member or member organization within the previous three months immediately preceding the date of the telephone call, which relationship has not been previously terminated by either party.

(B) A person's specific do-not-call request, as set forth in paragraph (a)(2) of this rule, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the person continues to do business with the member or member organization.

(C) A person's established business relationship with a member or member organization does not extend to the member or member organization's affiliated entities unless the person would reasonably expect them to be included, given the nature and type of products or services offered by the affiliate and the identity of the affiliate. Similarly, a person's established business relationship with an affiliate of a member or member organization does not extend to the member or member organization unless the person would reasonably expect them to be included, given the nature and type of products or services offered, and the identity of, the member or member organization.

(2) The terms ''telemarketing'' and ''telephone solicitation'' mean the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(3) The term ''telephone facsimile machine'' means equipment which has the capacity to transcribe text or images (or both) from paper, into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term ''personal relationship'' means any family member, friend, or acquaintance of the person making the call.

(5) The term ''account activity'' shall include, but not be limited to, purchases, sales, interest credits or debits, charges or credits, dividend payments, transfer activity, securities receipts or deliveries, and/or journal entries relating to securities or funds in the possession or control of the member.

(6) The terms ''automatic telephone dialing system'' and ''autodialer'' mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(7) The term ''broker-dealer of record'' refers to the broker-dealer identified on a customer's account application or accounts held directly at a mutual fund or variable insurance product issuer.

(8) The term ''unsolicited advertisement'' means any material advertising the commercial availability or quality of any products or services which is transmitted to any person without that person's prior express invitation or permission.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

Rule 440A currently states, in relevant part, that no member, allied member or employee of a member or member organization shall make an outbound telephone call to the residence of any person for the purpose of soliciting the purchase of securities or related services at any time other than between 8 a.m. and 9 p.m. local time at the called person's location without the prior consent of the person; or make an outbound telephone call to any person for the purpose of soliciting the purchase of securities or related services without disclosing promptly and in a clear and conspicuous manner to the called person the following information: (1) The identity of the caller and the member or member organization; (2) the telephone number or address at which the caller may be contacted; and (3) that the purpose of the call is to solicit the purchase of securities or related services.

Amendments to Rule 440A are being proposed to incorporate regulations issued by the Federal Communications Commission (''FCC'') and the Federal Trade Commission (''FTC'') relating to the implementation of the national do-not-call registry and the amendments to the Telephone Consumer Protection Act of 1991 (''TCPA'').[6] The Exchange proposes to delete current Rule 440A and adopt new language that incorporates the requirements of the FCC regulation, which is applicable to broker-dealers, and those sections of current Rule 440A that remain relevant.

Background

Both the FTC and FCC have established requirements for sellers and telemarketers to participate in a national do-not-call registry. Beginning in June 2003, consumers have been able to enter their home telephone numbers into the national do-not-call registry, which is maintained by the FTC. Under rules of the FTC and FCC, sellers and telemarketers generally are prohibited from making telephone solicitations to consumers whose numbers are listed in the national do-not-call registry.

In 1992 and 1995, the FCC and FTC developed requirements for firms to maintain do-not-call lists and to limit the hours of telephone solicitations.[7] The NYSE adopted substantially similar rules in 1995 and 1997.[8] On July 2, 2003, the SEC requested that the NYSE amend its telemarketing rules to include a requirement for its members and member organizations to participate in the national do-not-call registry.

The NYSE is proposing to amend Rule 440A to incorporate the national do-not-

[6] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC 03–153, adopted June 26, 2003, 68 FR 44144 (July 25, 2003) (''Adopting Release''). The FCC rules address such diverse topics as abandoned calls and calls made on behalf of tax exempt non-profit organizations. The NYSE's proposed amendment does not contain these provisions as such matters generally fall outside the purview of the investor protection concerns underlying the proposed rule change. Nevertheless, members and member organizations are subject to the FCC national do-not-call rules and must therefore, comply with those provisions or risk action by the FCC.

[7] The TCPA required the SEC to promulgate telemarketing rules substantially similar to those of the FTC or direct self-regulatory organizations to do so, unless the SEC determined that such rules were not in the interest of investor protection. *See* 47 U.S.C. 6102(d) (2003).

[8] *See* SEC Rel. No. 34–35821 (June 7, 1995), 60 FR 31527 (June 14, 1995) (Order approving NYSE rule requiring members to maintain firm-specific do-not-call lists), and SEC Rel. No. 34–38638 (May 14, 1997), 62 FR 27823 (May 21, 1997) (Order approving NYSE rule and interpretation creating telemarketing time-of-day restrictions and disclosure provisions).

call registry. Because broker-dealers are subject to the FCC's telemarketing rules, the NYSE modeled its rule after the FCC's rules, with minor modifications tailored to its members and member organizations and the securities industry.[9] A similar rule was filed by NASD with the SEC on August 18, 2003 and approved on January 20, 2004.[10]

Proposed Rule

Congress enacted the TCPA in an effort to address a growing number of telephone marketing practices thought to be an invasion of consumer privacy and even a risk to public safety. The statute restricts the use of automatic telephone dialing systems, artificial and prerecorded messages, and telephone facsimile machines to send unsolicited advertisements.

''Telephone Solicitation'' and ''Telemarketing''

The proposed rule defines both ''telemarketing'' and ''telephone solicitation'' to include the initiation of a telephone call or message transmitted to any person for the purpose of encouraging the purchase of, or investment in, property, goods, or services.

Time/Date and Other Requirements

Telephone solicitations and telemarketing calls would only be permitted between the hours of 8 a.m. and 9 p.m. local time at the called party's location subject to certain exceptions. The time-of-day restriction is similar to the one currently set out in Rule 440A. Telemarketing calls are prohibited to numbers in the national do-not-call registry and on firm-specific do-not-call lists. Furthermore, members and member organizations that take part in telemarketing activities would be required to maintain policies, train personnel, record and maintain do-not-call requests and identify the person making the call, the name of the member or member organization employer, an address or telephone number at which the firm may be contacted, and inform the called party of the purpose of the call. The telephone number may not be a 900 or similar number. Members and member organizations would be required to honor a request to be placed on a firm-specific do-not-call list within 30 days or sooner if they are able to do so. A firm-specific do-not-call request applies only to the member or member organization making the call, and not to any affiliated entity unless the customer reasonably would expect the affiliated entity to be included, given the identification of the caller and the product being advertised.

Exceptions From National Do-Not-Call List Restriction

The proposed rule provides exceptions from the rule's national do-not-call list restriction for (1) calls made to persons with whom the member or member organization has an ''established business relationship,'' (2) calls made to persons from whom a member or member organization has obtained prior express invitation or permission evidenced by a written agreement, and (3) calls to persons with which a member, allied member, or employee of a member or member organization has a personal relationship. A ''personal relationship'' is a relationship between the person making the call and a family member, friend, or acquaintance. Members and member organizations should be aware that the personal relationship exception applies solely to the rule's national do-not-call registry restriction. Thus, if a person with whom an employee of a member has a personal relationship has requested to be placed on a member's do-not-call list, the employee may not make a telephone solicitation to the person on behalf of the member.

''Established Business Relationship''

An ''established business relationship'' [11] means a prior or existing relationship formed by a voluntary two-way communication between a member or member organization and a person, with or without an exchange of consideration, if: the person has made a financial transaction or has a position in their account within the previous 18 months immediately preceding the call; the member or member organization is the broker of record for the person's account within the preceding 18 months; or the person has contacted the member or member organization to inquire about or make an application regarding a product or service within the preceding three months.

Safe Harbor

The proposed rule provides that a member or employee of a member or member organization will not be liable for a violation of the rule's national do-not-call registry restriction if the member or employee of a member or member organization demonstrates that the violation is the result of an error and the member or member organization meets certain standards as part of its routine business practice. These standards involve: Written procedures to comply with national do-not-call rules; training of personnel to comply with national do-not-call rules; recording and maintaining a list of telephone numbers that the member or member organization may not contact; and using a documented process, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules.

Wireless Telephone Numbers

Members and member organizations are prohibited from making telephone solicitations and telemarketing calls to wireless telephone numbers. In addition, automatic telephone dialing systems and artificial or prerecorded voices used to contact wireless telephone numbers are also prohibited.

Artificial/Prerecorded Messages

Members and member organizations are prohibited from using artificial or prerecorded voice messages for commercial purposes unless: They have permission, the message does not include an unsolicited advertisement or constitute a telephone solicitation, or the message is transmitted to a person with whom the member or member organization has an established business relationship. All artificial or prerecorded messages must state clearly the identity and telephone number of the member or member organization and the name it is registered to conduct business with the applicable State Corporation Commission. The telephone number for the member or member organization may not be a 900 or similar number.

Telephone Facsimile Machines or Computer Advertisements

Members and member organizations are prohibited from using a telephone facsimile machine, computer or other

[9] Substantively, the Rules of the FCC and FTC are very similar. Indeed, Congress has asked the FCC to consult with the FTC to maximize consistency between their respective do-not-call rules. *See* The Do-Not-Call Implementation Act, 108 P.L. 10, 117 Stat. 557 (March 11, 2003).

[10] SEC Rel. No. 34–49055 (January 12, 2004), 69 FR 2801 (January 20, 2004) (Order approving proposed rule change, and notice of filing and order granting accelerated approval to Amendment No. 1 relating to NASD's telemarketing rules to require members to participate in the national do-not-call registry). *See also* SR–NASD–2004–174 (November 24, 2004) (Proposed amendment to NASD Rule 2212 (Telemarketing) regarding the frequency of updates from the national do-not-call registry).

[11] *See* Adopting Release, *supra* note 6, at 44178.

device to send an unsolicited advertisement to a telephone facsimile machine, computer or other device, without the express permission of the recipient. Members and member organizations must clearly mark, in a margin at the top or bottom of each page of the transmission, the date and time it is sent and the identification of the member or member organization sending the message and the telephone number of the sending machine.

Caller Identification Information

Members and member organizations that engage in telemarketing must transmit caller identification information and are explicitly prohibited from blocking caller identification information. Caller identification information must include either the Calling Party Number (''CPN'') or the calling party's billing number, also known as the Charge Number (''ANI''), and when available from the telephone carrier, the name of the member or member organization. The telephone number provided must permit any person to make a do-not-call request during normal business hours. Provision of caller identification information does not eliminate the requirement for a caller to verbally supply identification information during a call. These provisions are intended to promote appropriate caller identification practices that comport with the FCC's caller identification rules [12] and related guidance.[13]

Outsourcing

The proposed rule provides that if a member or member organization uses another entity to perform telemarketing services on its behalf, the member or member organization remains responsible for ensuring compliance with all provisions of the rule.

(2) Statutory Basis

The proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with the requirements of Section 6(b)(5) [14] of the Exchange Act. Section 6(b)(5) requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and national market system, and in general, to protect investors and the public interest. The Exchange believes the proposed rule change will enhance investor protection by enabling persons who do not want to receive telephone solicitations from members or member organizations to receive the protections of the national do-not-call registry.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

(a) By order approve such proposed rule change, or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2004–73 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–NYSE–2004–73. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2004–73 and should be submitted on or before September 15, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–4653 Filed 8–24–05; 8:45 am]

BILLING CODE 8010–01–P

[12] *See* 47 CFR 64.1601(e).

[13] *See* Adopting Release, *supra* note 6, at 44167.

[14] 15 U.S.C. 78f(b)(5).

[15] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Audit and Financial Management Advisory (AFMAC) Committee Meeting

The U.S. Small Business Administration's Audit and Financial Management Advisory Committee (AFMAC) will meet on September 12, 2005 at 11 a.m. in the Administrator's conference room. The AFMAC was established by the Administrator of the SBA to provide recommendation and advice regarding the Agency's financial management including the financial reporting process, systems of internal controls, audit process and process for monitoring compliance with relevant laws and regulations.

Anyone wishing to attend must contact Thomas Dumaresq in writing or by fax. Thomas Dumaresq, Chief Financial Officer, 409 3rd Street SW., Washington, DC 20416, phone (202)

205–6506, fax: (202) 205–6869, e-mail: *thomas.dumaresq@sba.gov*.

Dated: August 17, 2005.

Carmen-Rosa Torres,

Director, Office of the Chief Financial Officer, Office of Analysis, Planning and Accountability.

[FR Doc. 05–16921 Filed 8–24–05; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Small Business Size Standards: Waiver of the Nonmanufacturer Rule

AGENCY: Small Business Administration (SBA).

ACTION: Notice of intent to waive the Nonmanufacturer Rule for Commercial Laundry Equipment, including Commercial Laundry Manufacturing, Dry Cleaning Equipment Manufacturing and Pressing Machine Manufacturing.

SUMMARY: The U.S. Small Business Administration (SBA) is considering granting a waiver of the Nonmanufacturer Rule for Commercial Laundry Equipment, including Commercial Laundry Manufacturing, Dry Cleaning Equipment Manufacturing, and Pressing Machine Manufacturing. The basis for waivers is that no small business manufacturers are supplying these classes of products to the Federal government. The effect of a waiver would be to allow otherwise qualified regular dealers to supply the products of any domestic manufacturer on a Federal contract set aside for small businesses, service disabled veteran-owned small businesses or SBA's 8(a) Business Development Program. The purpose of this notice is to solicit comments and potential source information from interested parties.

DATES: Comments and sources must be submitted on or before September 9, 2005.

FOR FURTHER INFORMATION CONTACT: Edith Butler, Program Analyst, by telephone at (202) 619–0422; by FAX at 481–1788; or by e-mail at *edith.butler@sba.gov*.

SUPPLEMENTARY INFORMATION: Section 8(a)(17) of the Small Business Act, (Act) 15 U.S.C. 637(a)(17), requires that recipients of Federal contracts set aside for small businesses, service-disabled veteran-owned small businesses, or SBA's 8(a) Business Development Program provide the product of a small business manufacturer or processor, if the recipient is other than the actual manufacturer or processor. This requirement is commonly referred to as the Nonmanufacturer Rule.

The SBA regulations imposing this requirement are found at 13 CFR 121.406 (b). Section 8(a)(17)(b)(iv) of the Act authorizes SBA to waive the Nonmanufacturer Rule for any ''class of products'' for which there are no small business manufacturers or processors in the Federal market.

As implemented in SBA's regulations at 13 CFE 121.1204, in order to be considered available to participate in the Federal market for a class of products, a small business manufacturer must have submitted a proposal for a contract solicitation or received a contract from the Federal government within the last 24 months. The SBA defines ''class of products'' based on six digit coding systems. The first coding system is the Office of Management and Budget *North American Industry Classification System (NAICS).* The second is the Product and Service Code established by the Federal Procurement Data System.

The SBA is currently processing a request to waive the Nonmanufacturer Rule for Commercial Laundry Equipment, including Commercial Laundry Manufacturing, Dry Cleaning Equipment Manufacturing and Pressing Machine Manufacturing, North American Industry Classification System (NAICS) 333312.

The public is invited to comment or provide source information to SBA on the proposed waiver of the nonmanufacturer rule for this NAICS code.

Authority: 15 U.S.C. 637(A)(17).

Dated: August 19, 2005.

Dean Koppel,

Assistant Administrator, Office of Policy and Research.

[FR Doc. 05–16916 Filed 8–24–05; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Small Business Size Standards: Waiver of the Nonmanufacturer Rule

AGENCY: Small Business Administration.

ACTION: Notice of intent to waive the Nonmanufacturer Rule for Household Laundry Equipment, including Laundry Equipment (washers and dryers) and Household Type Manufacturing.

SUMMARY: The U.S. Small Business Administration (SBA) is considering granting a waiver of the Nonmanufacturer Rule for Household Laundry Equipment, including Laundry Equipment (washers and dryers) and Household Type Manufacturing.

The basis for waivers is that no small business manufacturers are supplying these classes of products to the Federal government. The effect of a waiver would be to allow otherwise qualified regular dealers to supply the products of any domestic manufacturer on a Federal contract set aside for small businesses, service disabled veteran-owned small businesses or SBA's 8(a) Business Development Program. The purpose of this notice is to solicit comments and potential source information from interested parties.

DATES: Comments and sources must be submitted on or before September 9, 2005.

FOR FURTHER INFORMATION CONTACT: Edith Butler, Program Analyst, by telephone at (202) 619–0422; by FAX at 481–1788; or by e-mail at *edith.butler@sba.gov*.

SUPPLEMENTARY INFORMATION: Section 8(a)(17) of the Small Business Act, (Act) 15 U.S.C. 637(a)(17), requires that recipients of Federal contracts set aside for small businesses, service-disabled veteran-owned small businesses, or SBA's 8(a) Business Development Program provide the product of a small business manufacturer or processor, if the recipient is other than the actual manufacturer or processor. This requirement is commonly referred to as the Nonmanufacturer Rule.

The SBA regulations imposing this requirement are found at 13 CFR 121.406(b). Section 8(a)(17)(b)(iv) of the Act authorizes SBA to waive the Nonmanufacturer Rule for any ''class of products'' for which there are no small business manufacturers or processors in the Federal market.

As implemented in SBA's regulations at 13 CFE 121.1204, in order to be considered available to participate in the Federal market for a class of products, a small business manufacturer must have submitted a proposal for a contract solicitation or received a contract from the Federal government within the last 24 months. The SBA defines ''class of products'' based on six digit coding systems. The first coding system is the Office of Management and Budget *North American Industry Classification System (NAICS).* The second is the Product and Service Code established by the Federal Procurement Data System.

The SBA is currently processing a request to waive the Nonmanufacturer Rule for Household Laundry Equipment, including Laundry Equipment (washers and dryers) and Household Type Manufacturing, North American Industry Classification System (NAICS) 335224.

The public is invited to comment or provide source information to SBA on

the proposed waiver of the nonmanufacturer rule for this NAICS code.

Authority: 15 U.S.C. 637(A)(17).

Dated: August 19, 2005.

Dean Koppel,

Assistant Administrator, Office of Policy and Research.

[FR Doc. 05–16917 Filed 8–24–05; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Small Business Size Standards: Waiver of the Nonmanufacturer Rule

AGENCY: Small Business Administration (SBA).

ACTION: Notice of intent to waive the Nonmanufacturer Rule for household cooking equipment.

SUMMARY: The U.S. Small Business Administration (SBA) is considering granting a waiver of the Nonmanufacturer Rule for Household Cooking Equipment. The basis for waivers is that no small business manufacturers are supplying these classes of products to the Federal Government. The effect of a waiver would be to allow otherwise qualified regular dealers to supply the products of any domestic manufacturer on a Federal contract set aside for small businesses, service disabled veteran-owned small businesses or SBA's 8(a) Business Development Program. The purpose of this notice is to solicit comments and potential source information from interested parties.

DATES: Comments and sources must be submitted on or before September 9, 2005.

FOR FURTHER INFORMATION CONTACT: Edith Butler, Program Analyst, by telephone at (202) 619–0422; by FAX at 481–1788; or by e-mail at *edith.butler@sba.gov*.

SUPPLEMENTARY INFORMATION: Section 8(a)(17) of the Small Business Act (Act), 15 U.S.C. 637(a)(17), requires that recipients of Federal contracts set aside for small businesses, service-disabled veteran-owned small businesses, or SBA's 8(a) Business Development Program provide the product of a small business manufacturer or processor, if the recipient is other than the actual manufacturer or processor. This requirement is commonly referred to as the Nonmanufacturer Rule.

The SBA regulations imposing this requirement are found at 13 CFR 121.406(b). Section 8(a)(17)(b)(iv) of the Act authorizes SBA to waive the Nonmanufacturer Rule for any ''class of products'' for which there are no small business manufacturers or processors in the Federal market.

As implemented in SBA's regulations at 13 CFE 121.1204, in order to be considered available to participate in the Federal market for a class of products, a small business manufacturer must have submitted a proposal for a contract solicitation or received a contract from the Federal Government within the last 24 months. The SBA defines ''class of products'' based on six digit coding systems. The first coding system is the Office of Management and Budget *North American Industry Classification System (NAICS).* The second is the Product and Service Code established by the Federal Procurement Data System.

The SBA is currently processing a request to waive the Nonmanufacturer Rule for Household Cooking Equipment, North American Industry Classification System (NAICS) 335221.

The public is invited to comment or provide source information to SBA on the proposed waiver of the nonmanufacturer rule for this NAICS code.

Authority: 15 U.S.C. 637(A)(17).

Dated: August 19, 2005.

Dean Koppel,

Assistant Administrator, Office of Policy and Research.

[FR Doc. 05–16918 Filed 8–24–05; 8:45 am]

BILLING CODE 8025–01–M

SMALL BUSINESS ADMINISTRATION

Small Business Size Standards: Waiver of the Nonmanufacturer Rule

AGENCY: Small Business Administration.

ACTION: Notice of intent to waive the Nonmanufacturer Rule for household refrigerator equipment.

SUMMARY: The U.S. Small Business Administration (SBA) is considering granting a waiver of the Nonmanufacturer Rule for Household Refrigerator Equipment.

The basis for waivers is that no small business manufacturers are supplying these classes of products to the Federal Government. The effect of a waiver would be to allow otherwise qualified regular dealers to supply the products of any domestic manufacturer on a Federal contract set aside for small businesses, service disabled veteran-owned small businesses or SBA's 8(a) Business Development Program. The purpose of this notice is to solicit comments and potential source information from interested parties.

DATES: Comments and sources must be submitted on or before September 9, 2005.

FOR FURTHER INFORMATION CONTACT: Edith Butler, Program Analyst, by telephone at (202) 619–0422; by FAX at 481–1788; or by email at *edith.butler@sba.gov*.

SUPPLEMENTARY INFORMATION: Section 8(a)(17) of the Small Business Act (Act), 15 U.S.C. 637(a)(17), requires that recipients of Federal contracts set aside for small businesses, service-disabled veteran-owned small businesses, or SBA's 8(a) Business Development Program provide the product of a small business manufacturer or processor, if the recipient is other than the actual manufacturer or processor. This requirement is commonly referred to as the Nonmanufacturer Rule.

The SBA regulations imposing this requirement are found at 13 CFR 121.406(b). Section 8(a)(17)(b)(iv) of the Act authorizes SBA to waive the Nonmanufacturer Rule for any ''class of products'' for which there are no small business manufacturers or processors in the Federal market.

As implemented in SBA's regulations at 13 CFE 121.1204, in order to be considered available to participate in the Federal market for a class of products, a small business manufacturer must have submitted a proposal for a contract solicitation or received a contract from the Federal Government within the last 24 months. The SBA defines ''class of products'' based on six digit coding systems. The first coding system is the Office of Management and Budget *North American Industry Classification System (NAICS).* The second is the Product and Service Code established by the Federal Procurement Data System.

The SBA is currently processing a request to waive the Nonmanufacturer Rule for Household Refrigerator Equipment, North American Industry Classification System (NAICS) 335222.

The public is invited to comment or provide source information to SBA on the proposed waiver of the nonmanufacturer rule for this NAICS code.

Authority: 15 U.S.C. 637(A)(17).

Dated: August 19, 2005.

Dean Koppel,

Assistant Administrator, Office of Policy and Research.

[FR Doc. 05–16919 Filed 8–24–05; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Small Business Size Standards: Waiver of the Nonmanufacturer Rule

AGENCY: Small Business Administration.

ACTION: Notice of intent to waive the Nonmanufacturer Rule for Commercial Cooking Equipment.

SUMMARY: The U. S. Small Business Administration (SBA) is considering granting a waiver of the Nonmanufacturer Rule for Commercial Cooking Equipment.

The basis for waivers is that no small business manufacturers are supplying these classes of products to the Federal government. The effect of a waiver would be to allow otherwise qualified regular dealers to supply the products of any domestic manufacturer on a Federal contract set aside for small businesses, service disabled veteran-owned small businesses or SBA's 8(a) Business Development Program. The purpose of this notice is to solicit comments and potential source information from interested parties.

DATES: Comments and sources must be submitted on or before September 9, 2005.

FOR FURTHER INFORMATION CONTACT: Edith Butler, Program Analyst, by telephone at (202) 619–0422; by FAX at 481–1788; or by e-mail at *edith.butler@sba.gov*.

SUPPLEMENTARY INFORMATION: Section 8(a)(17) of the Small Business Act, (Act) 15 U.S.C. 637 (a)(17), requires that recipients of Federal contracts set aside for small businesses, service-disabled veteran-owned small businesses, or SBA's 8(a) Business Development Program provide the product of a small business manufacturer or processor, if the recipient is other than the actual manufacturer or processor. This requirement is commonly referred to as the Nonmanufacturer Rule.

The SBA regulations imposing this requirement are found at 13 CFR 121.406(b). Section 8(a)(17)(b)(iv) of the Act authorizes SBA to waive the Nonmanufacturer Rule for any ''class of products'' for which there are no small business manufacturers or processors in the Federal market.

As implemented in SBA's regulations at 13 CFR 121.1204, in order to be considered available to participate in the Federal market for a class of products, a small business manufacturer must have submitted a proposal for a contract solicitation or received a contract from the Federal government within the last 24 months. The SBA defines ''class of products'' based on six digit coding systems. The first coding system is the Office of Management and Budget *North American Industry Classification System (NAICS)*. The second is the Product and Service Code established by the Federal Procurement Data System.

The SBA is currently processing a request to waive the Nonmanufacturer Rule for Commercial Cooking Equipment, North American Industry Classification System (NAICS) 333319.

The public is invited to comment or provide source information to SBA on the proposed waiver of the nonmanufacturer rule for this NAICS code.

Authority: 15 U.S.C. 637(A)(17).

Dated: August 19, 2005.

Dean Koppel,

Assistant Administrator, Office of Policy and Research.

[FR Doc. 05–16920 Filed 8–24–05; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 5174]

Culturally Significant Objects Imported for Exhibition Determinations: ''Assorted Egyptian Treasures for Public Exhibition''

AGENCY: Department of State.

ACTION: Notice, correction.

SUMMARY: On June 2, 2005, notice was published on page 32392 of the **Federal Register** (volume 70, number 105) of determinations made by the Department of State pertaining to the exhibitions ''Mummy: the inside story'' and ''Treasures of Ancient Art from the British Museum.'' The referenced notice is corrected as to additional objects to be included in the the exhibition ''Mummy: the inside story.'' Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the additional objects to be included in the exhibition ''Mummy: the inside story'', imported from abroad for temporary exhibition within the United States, are of cultural significance. The additional objects are imported pursuant to loan agreements with the foreign owners. I also determine that the exhibition or display of the additional exhibit objects at the Houston Museum of Natural Science, Houston, TX, from on or about September 30, 2005, until on or about February 12, 2006 (with one object remaining for longer-term exhibit), at the Gulf Coast Exploreum, Mobile, AL, from on or about March 8, 2006, until on or about August 4, 2006, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Richard Lahne, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/453–8058). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: August 19, 2005.

Travis Horel,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Department of State.

[FR Doc. 05–16937 Filed 8–24–05; 8:45 am]

BILLING CODE 4710–08–P

TRADE AND DEVELOPMENT AGENCY

Notice of Public Information Collection Requirements Submitted to OMB for Review

AGENCY: United States Trade and Development Agency.

ACTION: Request for comments.

SUMMARY: USTDA invites general public and other Federal agencies to take this opportunity to comment on the following proposed information collection, as required by the Paperwork Reduction Act of 1995. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information

technology, *e.g.*, permitting electronic submission of responses.

DATES: Comments must be received by October 24, 2005.

ADDRESSES: Copies of the subject form and the request for review prepared for submission to OMB may be obtained from the Agency Submitting Officer. Comments on the form should be submitted to the Agency Submitting Officer.

FOR FURTHER INFORMATION CONTACT: Carolyn Hum, Attn: PRA, 1000 Wilson Boulevard, Suite 1600, Arlington, VA 22209–3901; Tel.: (703) 875–4357, Fax: (703) 875–4009, E-mail: *PRA@ustda.gov*.

SUPPLEMENTARY INFORMATION:

Summary Collection Under Review

Type of Request: New collection.
Title: Evaluation of USTDA Performance.
Form Number: USTDA 1000E–2005a.
Frequency of Use: Annually for duration of project.
Type of Respondents: Business or other for profit; Not-for-profit institutions; Farms; Federal Government.
Description of Affected Public: U.S. companies and other entities that participate in USTDA-funded activities.
Reporting Hours: 866 hours per year.
Number of Responses: 2600 per year.
Federal Cost: $350,000 per year.
Authority for Information Collection: Government Performance and Results Act of 1993, 103 Public Law 62; 107 Stat. 285.
Abstract (Needs and Uses): USTDA and contractors will collect information from various stakeholders on USTDA-funded activities regarding developmental impact and/or commercial objectives as well as evaluate success regarding GPRA and OMB PART objectives.

Dated: August 22, 2005.

Carolyn Hum,

Administrative Officer.

[FR Doc. 05–16947 Filed 8–24–05; 8:45 am]

BILLING CODE 8040–01–U

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending August 5, 2005

The following Agreements were filed with the Department of Transportation under Sections 412 and 414 of the Federal Aviation Act, as amended (49 U.S.C. 1382 and 1384) and procedures governing proceedings to enforce these provisions. Answers may be filed within 21 days after the filing of the application.

Docket Number: OST–2005–22028.
Date Filed: August 2, 2005.
Parties: Members of the International Air Transport Association.
Subject:
Montreal, 14–16 June 2005 (Memo 0113), TC12 North Atlantic Canada-Europe Resolutions r1-r16.
Minutes PTC12 CAN-EUR (Memo 0115), Technical Correction PTC12 North-Atlantic Canada-Europe (Memo 0114).
Tables: TC12 North Atlantic Canada-Europe Specified fares, Tables (Memo 0045).
Intended effective date: 1 November 2005.

Docket Number: OST–2005–22029.
Date Filed: August 2, 2005.
Parties: Members of the International Air Transport Association.
Subject:
Mail Vote 448.
TC12 North Atlantic USA-Europe (Memo 0183) (except between USA and Austria, Belgium, Czech Republic, Finland, France, Germany, Iceland, Italy, Netherlands, Scandinavia, Switzerland).
Mail Vote 449.
TC12 North Atlantic USA-Europe (Memo 0184) (between USA and Austria, Belgium, Czech Republic, Finland, France, Germany, Italy, Netherlands, Scandinavia, Switzerland) r1–r34.
Minutes: TC12 North Atlantic Canada, USA-Europe (Memo 0185), Montreal, 14–16 June 2005.
Tables: TC12 North Atlantic USA-Europe Specified Fares Tables (Memo 0100).
Intended effective date: 1 November 2005.

Docket Number: OST–2005–22030.
Date Filed: August 2, 2005.
Parties: Members of the International Air Transport Association.
Subject:
TC2 Within Middle East Expedited Resolution 002ac (Memo 0146).
TC2 Europe-Middle East Expedited Resolution 002ab (Memo 0203).
Intended effective date: 15 August 2005.

Docket Number: OST–2005–22038.
Date Filed: August 2, 2005.
Parties: Members of the International Air Transport Association.
Subject:
PTC3 0869 Dated 2 August 2005.
Mail Vote 450—Resolution 010q.
TC3 Japan, Korea-South East Asia Special Passenger Amending Resolution between Japan and China (excluding Hong Kong SAR and Macao SAR).
Intended effective date: 5 August 2005.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 05–16909 Filed 8–24–05; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending August 5, 2005

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et. seq.*).

The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST–2005–22057.
Date Filed: August 4, 2005.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: August 25, 2005.
Description: Application of Air Macau Company Limited, requesting a foreign air carrier permit to engage in foreign air transportation of property and mail between Macau and the United States.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 05–16910 Filed 8–24–05; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2005–49]

Petitions for Exemption; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of disposition of prior petition.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application,

processing, and disposition of petitions for exemption, part 11 of Title 14, Code of Federal Regulations (14 CFR), this notice contains the disposition of certain petitions previously received. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

FOR FURTHER INFORMATION CONTACT: Tim Adams (202) 267–8033, Sandy Buchanan-Sumter (202) 267–7271, or John Linsenmeyer (202) 267–5174, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85 and 11.91.

Issued in Washington, DC, on August 19, 2005.

Anthony F. Fazio,

Director, Office of Rulemaking.

Disposition of Petitions

Docket No.: FAA–2003–14227.
Petitioner: Kenmore Air Harbor, Inc.
Sections of 14 CFR Affected: 14 CFR 135.154(b)(2).
Description of Relief Sought/ Disposition: To permit Kenmore Air Harbor, Inc., to operate four DHC–3 Turbine Otter aircraft that are not equipped with an approved terrain awareness and warning system that meets the requirements for Class B equipment in Technical Standard Order-C151. *Denial, 04/01/2005, Exemption No. 8532.*

Docket No.: FAA–2005–20770.
Petitioner: Arrow Air, Inc.
Sections of 14 CFR Affected: 14 CFR 121.354(b).
Description of Relief Sought/ Disposition: To permit Arrow Air, Inc., to operate certain DC–10 aircraft without those aircraft being equipped with an approved awareness and warning system that meets the requirements for Class A equipment in Technical Standard Order-C151; and to operate without an approved terrain situational awareness display. *Grant, 04/04/2005, Exemption No. 8527B.*

Docket No.: FAA–2004–19884.
Petitioner: Orbital Sciences Corporation.
Sections of 14 CFR Affected: 14 CFR 91.223(b) and (c).
Description of Relief Sought/ Disposition: To permit Orbital Sciences Corporation to operate a Lockheed L–1011 aircraft within and outside the United States after March 29, 2005, without being equipped with an approved terrain awareness and warning ssytem that meets the requirements for class B equipment in Technical Standard Order-C151. *Denial, 04/06/2005, Exemption No. 8534.*

Docket No.: FAA–2005–20558.
Petitioner: National Oceanic and Atmospheric Administration.
Sections of 14 CFR Affected: 14 CFR 91.223.
Description of Relief Sought/ Disposition: To permit the National Oceanic and Atmospheric Administration to operate two Rockwell WP–3D aircraft and one Gulfstream G-IV after March 29, 2005, without being equipped with an approved terrain awareness and warning system that meets the requirements for class B equipment in Technical Standard Order-C151. *Denial, 04/07/2005, Exemption No. 8537.*

Docket No.: FAA–2005–20749.
Petitioner: Centurion Air Cargo, Inc.
Sections of 14 CFR Affected: 14 CFR 121.354(b) and (c).
Description of Relief Sought/ Disposition: To permit Centurion Air Cargo, Inc. (CAC), to operate certain DC–10 aircraft without those aircraft being equipped with approved terrain awareness and warning system (TAWS) that meets the rquirements for Class A equipment in Technical Standard Order-C151; and to operate without an approved terrain situational awareness display. This exemption will also permit the switching of the deadlines for installing TAWS in two of CAC's aircraft. *Grant, 4/08/2005, Exemption No. 8528B.*

Docket No.: FAA–2005–20554.
Petitioner: Inter Island Airways, Inc.
Sections of 14 CFR Affected: 14 CFR 135.154(b)(1) and (c).
Description of Relief Sought/ Disposition: To permit Inter Island Airways, Inc., to operate its Dornier 228 aircraft after March 29, 2005, without having an approved terrain awareness and warning system that meets the requirements for Class A equipment in Technical Standard Order-C151 installed on those aircraft; and to operate its aircraft without an approved terrain situational awareness display. *Grant, 4/08/2005, Exemption No. 8520A.*

Docket No.: FAA–2005–20760.
Petitioner: Southern Air Charter.
Sections of 14 CFR Affected: 14 CFR 91.223(b).
Description of Relief Sought/ Disposition: To permit Southern Air Charter to operate its Beech 1900 aircraft after March 29, 2005, without being equipped with an approved terrain awareness and warning system that meets the requirements for Class B equipment in Technical Standard Order-C151. *Denial, 4/15/2005, Exemption No. 8539.*

Docket No.: FAA–2004–17062.
Petitioner: Rohr, Inc.
Sections of 14 CFR Affected: 14 CFR 21.325(b)(3).
Description of Relief Sought/ Disposition: To permit Rohr, Inc., to issue export airworthiness approvals for Class II and Class III products at Rohr, Inc. locations outside of the United States and 23 international locations. *Grant, 4/15/2005, Exemption No. 8291A.*

Docket No.: FAA–2002–13311 and FAA–2005–20461.
Petitioner: The Boeing Company.
Sections of 14 CFR Affected: 14 CFR 21.325(b)(3).
Description of Relief Sought/ Disposition: To permit Boeing's Organizational Designated Airworthiness Representatives to issue export airworthiness approvals for Class II and Class III products manufactured by Boeing-approved suppliers in 19 foreign countries, as well as Taiwan. *Grant, 4/15/2005, Exemption No. 6860D.*

Docket No.: FAA–2005–20106.
Petitioner: Cirrus Design Corporation.
Sections of 14 CFR Affected: 14 CFR 45.29(b)(1).
Description of Relief Sought/ Disposition: To permit Cirrus Design Corporation to use 3- or 4-inch nationality and registration marks for certain aircraft undergoing production test flights. *Denial, 4/15/2005, Exemption No. 8543.*

Docket No.: FAA–2003–15444.
Petitioner: America West Airlines, Inc.
Sections of 14 CFR Affected: 14 CFR 121.434(c)(1)(ii).
Description of Relief Sought/ Disposition: To permit America West Airlines, Inc., to substitute a qualified and authorized check airman or aircrew program designee for an Federal Aviation Administration inspector to observe a qualifying pilot in command who is completing initial or upgrade training specified in § 121.424 during at least one flight leg that includes a takeoff and a landing. *Grant, 4/19/2005, Exemption No. 8095A.*

Docket No.: FAA–2004–18751.
Petitioner: Vaughn College of Aeronautics and Technology.
Sections of 14 CFR Affected: 14 CFR part 147, Appendix C.
Description of Relief Sought/ Disposition: To permit Vaughn College of Aeronautics and Technology to teach

the curriculum for airframe structures, ''solder, braze, gas-weld, and arc-weld steel,'' to Teaching level 1 instead of level 2. *Denial, 4/20/2005, Exemption No. 8541.*

Docket No.: FAA–2005–20829.
Petitioner: Hummel Aviation, LLC.
Sections of 14 CFR Affected: 14 CFR 135.143(c)(2).
Description of Relief Sought/ Disposition: To permit Hummel Aviation, LLC, to operate certain aircraft under part 135 without a TSO–C112 (Mode S) transponder installed in the aircraft. *Grant, 4/21/2005, Exemption No. 8548.*

Docket No.: FAA–2002–14012.
Petitioner: The Blue Angels.
Sections of 14 CFR Affected: 14 CFR 91.117(a) and (b), 91.119(c), and 91.303(c), (d), and (e).
Description of Relief Sought/ Disposition: To permit The Blue Angels to conduct demonstration rehearsals involving low-level, high-speed, and aerobatic flight, subject to certain conditions and limitations; and to include the airspace directly above Class C and D airspace at NAS Pensacola, Florida; NAS Choctaw, Florida; and El Centro, California, below 10,000 feet mean sea level (MSL) as described in the conditions and limitations. *Grant, 4/27/2005, Exemption No. 4504H.*

Docket No.: FAA–2002–13688.
Petitioner: Promech, Inc., d.b.a Promech Air.
Sections of 14 CFR Affected: 14 CFR 135.203(a)(1).
Description of Relief Sought/ Disposition: To permit Promech, Inc., d.b.a Promech Air, to conduct operations under visual flight rules outside controlled airspace, over water, at an altitude below 500 feet above the surface. *Grant, 4/27/2005, Exemption No. 8108A.*

Docket No.: FAA–2005–20708.
Petitioner: World Airways, Inc.
Sections of 14 CFR Affected: 14 CFR 121.665 and 121.697(a)(1), (b), and (c).
Description of Relief Sought/ Disposition: To permit World Airways, Inc., to substitute a computer application signature for the signed load manifest required by these sections. *Grant, 4/27/2005, Exemption No. 8547.*

Docket No.: FAA–2000–8095.
Petitioner: Scenic Airlines, Inc.
Sections of 14 CFR Affected: 14 CFR 121.434(c)(1)(ii).
Description of Relief Sought/ Disposition: To permit Scenic Airlines, Inc., to substitute a qualified and authorized check airman or aircrew program designee for an FAA inspector to observe a qualifying pilot in command who is completing initial or upgrade training specified in § 121.424 during at least one flight leg that includes a takeoff and a landing. *Grant, 4/27/2005, Exemption No. 8088A.*

Docket No.: FAA–2003–15395.
Petitioner: Delta Air Lines, Inc.
Sections of 14 CFR Affected: 14 CFR SFAR 58, paragraph 6(b)(3)(ii)(A).
Description of Relief Sought/ Disposition: To permit Delta Air Lines, Inc., to meet line check requirements using an alternative line check program; and to conduct an alternative line check program. *Grant, 4/27/2005, Exemption No. 8107A.*

Docket No.: FAA–2001–8936.
Petitioner: Mr. Robert P. Lavery.
Sections of 14 CFR Affected: 14 CFR 91.109(a) and (b)(3).
Description of Relief Sought/ Disposition: To permit Mr. Robert P. Lavery to conduct certain flight instruction and simulated instrument flights to meet the recent instrument experience requirements in certain Beechcraft airplanes equipped with a functioning throw-over control wheel in place of functioning dual controls. *Grant, 4/27/2005, Exemption No. 7571B.*

Docket No.: FAA–2002–14119.
Petitioner: Department of the Navy, United States Marine Corps.
Sections of 14 CFR Affected: 14 CFR 91.209(a)(1) and (2).
Description of Relief Sought/ Disposition: To permit the Department of the Navy, United States Marine Corps to conduct helicopter night-vision device flight training operations without lighted aircraft position lights. *Grant, 4/27/2005, Exemption No. 8028A.*

Docket No.: FAA–2001–8878.
Petitioner: American Airlines.
Sections of 14 CFR Affected: 14 CFR 121.434(c)(3)(ii).
Description of Relief Sought/ Disposition: To permit American Airlines to substitute a qualified and authorized check airman in place of an FAA inspector to observe a qualifying pilot in command (PIC) while that PIC is performing prescribed duties during at least one flight leg that includes a takeoff and a landing when completing initial or upgrade training specified in § 121.434. *Grant, 4/27/2005, Exemption No. 6916C.*

Docket No.: FAA–2005–20038.
Petitioner: Era Helicopters LLC.
Sections of 14 CFR Affected: 14 CFR 91.411(b) and 91.413(c).
Description of Relief Sought/ Disposition: To permit Era Helicopters LLC to perform air traffic control transponder tests and inspections and altimeter system and altimeter reporting equipment tests and inspections for its 14 CFR part 135 aircraft maintained under a continous airworthiness maintenance program; and maintained in accordance with the requirements of 135.411(a)(1) and (a)(2). *Grant, 4/27/2005, Exemption No. 8474A.*

Docket No.: FAA–2005–20897.

Petitioner: Hampton Roads Charter Service.

Sections of 14 CFR Affected: 14 CFR 135.143(c)(2).

Description of Relief Sought/ Disposition: To permit Hampton Roads Charter Service to operate certain aircraft under part 135 without a TSO–C112 (Mode S) transponder installed in the aircraft. *Grant, 4/28/2005, Exemption No. 8545.*

Docket No.: FAA–2004–19520.

Petitioner: Unison Industries.

Sections of 14 CFR Affected: 14 CFR 45.15(b).

Description of Relief Sought/ Disposition: To permit Unison Industries to identify those parts that can be marked with a tag to contain a reference to a catalog specifying that part's installation eligibility, in those situations where that information must be listed on the tag. *Denial, 4/28/2005, Exemption No. 8544.*

Docket No.: FAA–2005–20857.

Petitioner: The Boeing Company.

Sections of 14 CFR Affected: 14 CFR 21.325(b)(3).

Description of Relief Sought/ Disposition: To permit Boeing's Organizational Designated Airworthiness Representatives to issue export airworthiness approvals for Class II and Class III products manufactured by Boeing-approved suppliers in India, Greece, South Korea, and Turkey. *Denial, 4/29/2005, Exemption No. 8549.*

Docket No.: FAA–2001–9030.

Petitioner: State of Alaska, Department of Natural Resources, Division of Forestry.

Sections of 14 CFR Affected: 14 CFR 91.119(b) and (c).

Description of Relief Sought/ Disposition: To permit pilots employed by the State of Alaska, Department of Natural Resources, Division of Forestry (DOF) or acting under the DOF contract to conduct certain firefighting operations. *Grant, 4/29/2005, Exemption No. 4063.*

[FR Doc. 05–16922 Filed 8–24–05; 8:45 am]
BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2005–22118; Notice 1]

Eaton Aeroquip, Inc., Receipt of Petition for Decision of Inconsequential Noncompliance

Eaton Aeroquip, Inc. (Eaton) has determined that the end fittings that it produced for nylon air brake hoses do not comply with S7.2.2(d) of 49 CFR 571.106, Federal Motor Vehicle Safety Standard (FMVSS) No. 106, ''Brake hoses.'' Eaton has filed an appropriate report pursuant to 49 CFR Part 573, ''Defect and Noncompliance Reports.''

Pursuant to 49 U.S.C. 30118(d) and 30120(h), Eaton has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of Eaton's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Affected are a total of approximately 7,784,614 end fittings produced from 2001 to June 30, 2005, plus an indeterminate number of end fittings produced prior to 2001 for which records are not available (Eaton acquired the end fitting manufacturing business on November 1, 2002). S7.2.2(d) of FMVSS No. 106 requires that each fitting shall be etched, embossed, or stamped with

(d) The * * * outside diameter of the plastic tubing to which the fitting is properly attached expressed in inches or fractions of inches or in millimeters followed by the letters OD * * *

The subject end fittings are missing the letters OD from their labels.

Eaton believes that the noncompliance is inconsequential to motor vehicle safety and that no corrective action is warranted. Eaton states that the purpose of the letters OD on the label is to indicate that the measurement refers to the outside diameter of a plastic tube as opposed to the inside diameter. Eaton points out that if the end user was to assume that the measurement referred to the inside diameter because of the absence of the letters OD, it ''would be physically impossible, for example, to insert a ½ inch inside diameter hose into an end fitting made for ½ inch outside diameter plastic tubing.'' According to Eaton, ''if an end-user were to mistakenly attempt to use the mislabeled end fittings with a hose, instead of plastic tubing, the incompatibility would be obvious because the diameters would not match.'' Eaton states that therefore, ''there is no potential that the mislabeled end fittings could be used improperly, and there could be no resulting issue of motor vehicle safety.''

Interested persons are invited to submit written data, views, and arguments on the petition described above. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods. Mail: Docket Management Facility, U.S. Department of Transportation, Nassif Building, Room PL–401, 400 Seventh Street, SW., Washington, DC, 20590–0001. Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC. It is requested, but not required, that two copies of the comments be provided. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays. Comments may be submitted electronically by logging onto the Docket Management System Web site at *http://dms.dot.gov*. Click on ''Help'' to obtain instructions for filing the document electronically. Comments may be faxed to 1–202–493–2251, or may be submitted to the Federal eRulemaking Portal: go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: September 26, 2005.

Authority: 49 U.S.C. 30118, 30120: Delegations of authority at CFR 1.50 and 501.8.

Issued on: August 19, 2005.

Ronald L. Medford,

Senior Associate Administrator for Vehicle Safety.

[FR Doc. 05–16860 Filed 8–24–05; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2005–22176; Notice 1]

Nissan Motor Company and Nissan North America, Receipt of Petition for Decision of Inconsequential Noncompliance

Nissan Motor Company, Ltd. and Nissan North America, Inc. (Nissan) have determined that certain vehicles that they produced in 2004 through 2005 do not comply with S9.2.2 of 49 CFR 571.225, Federal Motor Vehicle Safety Standard (FMVSS) No. 225, ''Child restraint anchorage systems.'' Nissan has filed an appropriate report pursuant to 49 CFR part 573, ''Defect and Noncompliance Reports.''

Pursuant to 49 U.S.C. 30118(d) and 30120(h), Nissan has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of Nissan's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Affected are a total of approximately 24,655 model year (MY) 2005 Infiniti FX vehicles manufactured from September 1, 2004 to July 13, 2005; 167 MY 2005 Infiniti Q45 vehicles with rear power seats manufactured from September 1, 2004 to June 30, 2005; and 65,361 MY 2005 Nissan Maxima vehicles manufactured from September 1, 2004 to July 11, 2005.

S9.2.2 of FMVSS No. 225 requires:

With adjustable seats adjusted as described in S9.2.3, each lower anchorage bar shall be located so that a vertical transverse plane tangent to the front surface of the bar is (a) Not more than 70 mm behind the corresponding point Z of the CRF [child restraint fixture], measured parallel to the bottom surface of the CRF and in a vertical longitudinal plane, while the CRF is pressed against the seat back by the rearward application of a horizontal force of 100 N at point A on the CRF.

The lower anchorage bars in the subject vehicles do not comply with this requirement. Nissan states that tests performed for NHTSA by MGA, Inc. revealed a noncompliance in a 2005 Infiniti FX, and Nissan subsequently investigated its vehicle models on this issue.

Nissan believes that the noncompliance is inconsequential to motor vehicle safety and that no

corrective action is warranted. Nissan provides several bases for this assertion.

First, Nissan states that the vehicles do comply with the alternative requirements S15 of FMVSS No. 225, which were available as a compliance option until September 1, 2004.

Second, Nissan states that the extent of the noncompliance is not significant. Specifically, it says:

> The left and right lower anchorages in the MY 2005 FX vehicle were located 76 mm and 83 mm behind Point Z, respectively, when tested by MGA under the procedures of S9.2.2. During its subsequent investigation using the MGA CRF, Nissan measured the lower anchorage location in the left and right rear seats in five other FX vehicles. The average distance from Point Z was 78 mm, and the greatest distance was 81 mm. The average distance for the four 5-seat Nissan Maxima vehicles tested was 76 mm, and the greatest distance was 81 mm. The average distance for the three 4-seat Maxima vehicles tested was 92 mm, and the greatest distance was 94 mm. At most, this reflects a distance of less than an inch beyond the distance specified in the standard, and the difference is less than one-half of an inch for the FX and the 5-seat Maxima models.

Third, Nissan conducted a survey program to assess the ease of installing CRSs in these vehicles, and set out the results as an attachment to its petition. Nissan points out that there were few unsuccessful attempts and says that the results ''clearly demonstrate that the noncompliance * * * does not adversely affect the ease of installation of the CRSs * * *'' Nissan also indicates that the latchings were accomplished in an average time of between 22 seconds and 39 seconds.

Fourth, Nissan states that ''other vehicle characteristics in these models compensate for the lower anchorage location to allow for ease of installation,'' including seat foam that compresses easily and suppleness of leather seats.

Interested persons are invited to submit written data, views, and arguments on the petition described above. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods. Mail: Docket Management Facility, U.S. Department of Transportation, Nassif Building, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001. Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC. It is requested, but not required, that two copies of the comments be provided. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays. Comments may be submitted electronically by logging onto the Docket Management System Web site at *http://dms.dot.gov*. Click on ''Help'' to obtain instructions for filing the document electronically. Comments may be faxed to 1–202–493–2251, or may be submitted to the Federal eRulemaking Portal: go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: September 26, 2005.

Authority: 49 U.S.C. 30118, 30120; delegations of authority at CFR 1.50 and 501.8.

Issued on: August 19, 2005.

Ronald L. Medford,

Senior Associate Administrator for Vehicle Safety.

[FR Doc. 05–16861 Filed 8–24–05; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 2005–21675; Notice 2]

General Motors Corporation, Grant of Petition for Decision of Inconsequential Noncompliance

General Motors Corporation (General Motors) has determined that certain model year 2005 vehicles that it produced do not comply with S6 of 49 CFR 571.205, Federal Motor Vehicle Safety Standard (FMVSS) No. 205, ''Glazing materials.'' Pursuant to 49 U.S.C. 30118(d) and 30120(h), General Motors has petitioned for a determination that this noncompliance is inconsequential to motor vehicle safety and has filed an appropriate report pursuant to 49 CFR Part 573, ''Defect and Noncompliance Reports.'' Notice of receipt of a petition was published, with a 30-day comment period, on June 30, 2005, in the **Federal Register** (70 FR 37893). NHTSA received no comments.

Affected are a total of approximately 7,326 model year 2005 Chevrolet Corvette coupes equipped with removable transparent Targa roofs. S6, certification and marking, of FMVSS No. 205 and the referenced Section 7 of ANSI/SAE Z26.1–1996 specify that the required identification and certification markings must be located on the glazing. On the subject vehicles, the required markings are present, but they are located on the frame of the Targa roof assembly, rather than on the glazing portion of the roof assembly.

General Motors believes that the noncompliance is inconsequential to motor vehicle safety and that no corrective action is warranted. The petitioner states:

—The subject glazing meets all applicable performance requirements of FMVSS No. 205. There is no safety performance implication associated with this technical noncompliance.

—The certifications markings required by FMVSS No. 205 are provided on the frame of the subject Corvette Targa roof assemblies. This noncompliance relates only to the location of the required markings, not to their presence.

—Once assembled, the Targa roof frame and glazing are indivisible. For in-service repair, the roof assembly (glazing mounted in frame) is serviced as a unit. There is no service provision to replace only the frame or only the glazing. As a practical matter, therefore, marking the frame is functionally equivalent to marking the glazing.

—Given the small volume of service parts that will be needed and the high investment cost required to manufacture the subject Corvette roof assemblies, it is probable that all service parts will be manufactured by the same supplier as the original equipment parts. Accordingly, there is virtually no chance of uncertainty about the manufacturer of the subject parts, should a need to identify the manufacturer arise in the future.

—GM is not aware of any crashes, injuries, customer complaints or field reports associated with this condition.

General Motors also states that NHTSA has previously granted inconsequential noncompliance petitions involving the omission of FMVSS No. 205 markings and provides the following examples: Western Star Trucks (63 FR 66232, 12/1/1998), Ford Motor Company (64 FR 70116, 12/15/1999), Toyota Motor Corporation (68 FR 10307, 3/4/2003), and Freightliner LLC (68 FR 65991, 11/24/2003).

NHTSA agrees with General Motors that the noncompliance is inconsequential to motor vehicle safety. The glazing meets all applicable performance requirements of FMVSS No. 205. The certifications markings required by FMVSS No. 205 are provided on the frame of the subject Corvette Targa roof assemblies. The roof frame and glazing are indivisible, and for in-service repair, the roof assembly (glazing mounted in frame) is serviced

as a unit. Therefore, there should not be any problem obtaining the appropriate replacement glazing.

General Motors is correct that the four petitions it cited, from Western Star Trucks, Ford Motor Company, Toyota Motor Corporation, and Freightliner LLC, were granted by NHTSA based on this rationale. General Motors has corrected the problem.

In consideration of the foregoing, NHTSA has decided that the petitioner has met its burden of persuasion that the noncompliance described is inconsequential to motor vehicle safety. Accordingly, General Motors's petition is granted and the petitioner is exempted from the obligation of providing notification of, and a remedy for, the noncompliance.

Authority: (49 U.S.C. 30118, 30120; delegations of authority at CFR 1.50 and 501.8)

Issued on: August 19, 2005.

Ronald L. Medford,

Senior Associate Administrator for Vehicle Safety.

[FR Doc. 05–16862 Filed 8–24–05; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–55 (Sub–No. 659X)]

CSX Transportation, Inc.—Abandonment Exemption—in Allegany County, MD

CSX Transportation, Inc. (CSXT), has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon an 8.54-mile line of railroad on its Southern Region, Huntington Division East, Georges Creek Subdivision, between milepost BAI 27.0 near Morrison and milepost BAI 18.46 at the end of the track near Carlos, in Allegany County, MD. The line traverses United States Postal Service Zip Codes 21532, 21539, and 21521.

CSXT has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic on the line can be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on September 24, 2005, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by September 2, 2005. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by September 14, 2005, with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to CSXT's representative: Louis E. Gitomer, Esq., Ball Janik LLP, 1455 F Street, NW., Suite 225, Washington, DC 20005.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

CSXT has filed environmental and historic reports which address the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by August 30, 2005. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), CSXT shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by CSXT's filing of a notice of consummation by August 25, 2006, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: August 18, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 05–16835 Filed 8–24–05; 8:45 am]

BILLING CODE 4915–01–P

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each OFA must be accompanied by the filing fee, which currently is set at $1,200. *See* 49 CFR 1002.2(f)(25).

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Third-Party Disclosure in IRS Regulations; Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning existing regulations, Third-Party Disclosure Requirements in IRS Regulations.

DATES: Written comments should be received on or before October 24, 2005 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Allan Hopkins, at (202) 622–

6665, or at Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION: *Title:* Third-Party Disclosure requirements in IRS Regulations.

OMB Number: 1545–1466.

Abstract: These existing regulations contain third-party disclosure requirements that are subject to the Paperwork Reduction Act of 1995.

Current Actions: There are no changes being made to these regulations at this time.

Type of Review: Extension of currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations, and not-for-profit institutions.

Estimated Number of Respondents: 245,073,905.

Estimated Time Per Respondent: Varies.

Estimated Total Annual Burden Hours: 68,885,183.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 19, 2005.

Allan Hopkins,

IRS Reports Clearance Officer.

[FR Doc. E5–4654 Filed 8–24–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2600–0260]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Health Administration (VHA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on the need to obtain written consent to disclose medical treatment information to individuals or third parties.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before October 24, 2005.

ADDRESSES: Submit written comments on the collection of information to Ann Bickoff, Veterans Health Administration (193E1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *ann.bickoff@mail.va.gov*. Please refer to ''OMB Control No. 2600–0260'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Ann Bickoff at (202) 273–8310.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Titles: a. Request for and Authorization to Release Medical Records or Health Information, VA Form 10–5345.

b. Individual's Request for a Copy of their Own Health Information, VA Form 10–5345a.

OMB Control Number: 2600–0260.

Type of Review: Revision of a currently approved collection.

Abstract: a. VA Form 10–5345 is used to obtain written consent from a patient before information concerning his or her treatment for alcoholism or alcohol abuse, drug abuse, sickle cell anemia, or infection with the human immunodeficiency virus (HIV) can be disclosed to private insurance companies, physicians and other third parties. b. Patients complete VA Form 10–5345 to request a copy of their medical records from VA.

Affected Public: Business or other for profit, Individuals or households, and not for profit institutions.

Estimated Total Annual Burden

a. VA Form 10–5345—16,667 hours.

b. VA Form 10–5345a—16,667 hours.

Estimated Average Burden Per Respondent:

a. VA Form 10–5345—2 minutes.

b. VA Form 10–5345a—2 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents:

a. VA Form 10–5345—500,000.

b. VA Form 10–5345a—500,000.

Dated: August 11, 2005.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E5–4634 Filed 8–24–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on CARES Business Plan Studies; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Public Law 92–463 (Federal Advisory Committee Act) that the Advisory Committee on CARES Business Plan Studies will meet

as indicated below. The meetings are open to the public.

Location	Date	Time
VA Southern Oregon Rehabilitation Center and Clinics (SORCC) Campus Study, Auditorium (on campus), 8495 Crater Lake Hwy., White City, OR 97503.	Thursday, September 8, 2005	1 p.m. until 5 p.m.
Livermore Campus Study, VA Palo Alto Health Care System, Livermore Division, Building 90, NHCU Dining Room, 4951 Arroyo Road, Livermore, CA 94550.	Wednesday, September 14, 2005	9 a.m. until 4:30 p.m.
Poplar Bluff VA Medical Center Study, Poplar Bluff VA Medical Center, Building 1, Room 2099, 1500 North Westwood Blvd, Poplar Bluff, MO 63901.	Wednesday, September 14, 2005	1 p.m. until 4 p.m.
Manhattan/Brooklyn Study, Sheraton Hotel, 811 7th Ave and 53rd Sts., New York, NY 10019.	Monday, September 19, 2005	8:30 a.m. until 9 p.m.
Montrose Campus Study, Montrose Campus of VA Hudson Valley Health Care System, Theatre-Building 2, 2094 Albany Post Road, Montrose, New York 10548.	Thursday, September 22, 2005 ..	2:30 p.m. until 8 p.m.
West Los Angeles Campus Study, VA Greater Los Angeles Healthcare System, Wadsworth Theater, Bldg 226, 11301 Wilshire Blvd., Los Angeles, CA 90073.	Thursday, September 22, 2005 ..	12 p.m. until 9 p.m.
Lee's Town Campus Study, VA Medical Center, 2250 Leestown Road Division, Bldg. 4, Room 100 (Auditorium), Lexington, KY 40511.	Thursday, September 22, 2005 ..	9 a.m. until 4 p.m.
Perry Point Campus Study, Perry Point VA Medical Center, Building 314, Theater, Perry Point, MD 21902.	Tuesday, September 27, 2005 ...	9 a.m. until 4 p.m.
Boston Area Study, Campus Center Ballroom, University of Massachusetts/ Boston, Columbia Point, Boston, MA 02125.	Tuesday, September 27, 2005 ...	9:30 a.m. until 4 p.m.
Waco Campus Study, Waco Convention Center, 100 Washington Avenue, Waco, Texas 76702.	Tuesday, September 27, 2005 ...	8 a.m. until 6 p.m.
Gulfport Campus Study, VA Gulf Coast Veterans Health Care System, Bldg. 17, Recration Hall, 400 Veterans Avenue, Biloxi, MS 29531.	Thursday, September 29, 2005 ..	1 p.m. until 5 p.m.
St. Albans Campus Study, St. Albans Campus, 179th St. & Linden Blvd., Pratt Auditorium, St. Albans, NY 11425.	Thursday, September 29, 2005 ..	11 a.m. until 8:30 p.m.
Walla Walla VAMC Study, Wildhorse Resort and Casino, Cayuse Hall, Pendleton, OR 97801.	Friday, September 30, 2005	9 a.m. until 5 p.m.
Louisville Medical Center Study, The Clifton Center, 2117 Payne Street, Louisville, KY 40206.	Tuesday, October 4, 2005	10:30 a.m. until 6:30 p.m.

The purpose of the Committee is to provide advice to the Secretary of Veterans Affairs on proposed business plans at those VA facility sites identified in May 2004 as requiring further study by the Capital Asset Realignment for Enhanced Services (CARDS) Decision document.

The agenda at each meeting will include a discussion of the potential CARES Business Plan options for each site. The options have been developed by the VA contractor. The agenda will provide time for public comments on the options and for discussion of which options should be considered by the Secretary for further analysis and development in the next stage of the Business Plan Option development process.

Interested persons may attend and present oral or written statements to the Committee. For additional information regarding the meetings, please contact Mr. Jay Halpern, Designated Federal Officer, (00CARES), 810 Vermont Avenue, NW., Washington, DC 20024 by phone at (202) 273–5994, or by e-mail at *jay.halpern@va.gov*.

Dated: August 18, 2005.

By direction of the Secretary.

E. Philip Riggin,

Committee Management Officer.

[FR Doc. 05–16849 Filed 8–24–05; 8:45 am]

BILLING CODE 8320–01–M

Federal Register

Thursday,
August 25, 2005

Part II

Department of Transportation

Federal Motor Carrier Safety Administration

49 CFR Parts 385, 390, and 395
Hours of Service of Drivers; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 385, 390 and 395

[Docket No. FMCSA–2004–19608; formerly FMCSA–1997–2350]

RIN–2126–AA90

Hours of Service of Drivers

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Final rule.

SUMMARY: FMCSA is publishing today its final rule governing hours of service for commercial motor vehicle drivers, following its Notice of Proposed Rulemaking published January 24, 2005. The rule addresses requirements for driving, duty, and off-duty time; a recovery period, sleeper berth, and new requirements for short-haul drivers. The hours-of-service regulations published on April 28, 2003, were vacated by the U.S. Court of Appeals for the District of Columbia Circuit on July 16, 2004. Congress subsequently provided, through the Surface Transportation Extension Act of 2004, that the 2003 regulations will remain in effect until the effective date of a new final rule addressing the issues raised by the court or September 30, 2005, whichever occurs first. Today's rule meets that requirement.

DATES: This rule is effective October 1, 2005.

FOR FURTHER INFORMATION CONTACT: Tom Yager, Chief, Driver and Carrier Operations Division, Office of Bus and Truck Standards and Operations (MC–PSD), Federal Motor Carrier Safety Administration, 400 Seventh Street. S.W., Washington, DC 20590. Phone 202–366–4009, E-mail *MCPSD@fmcsa.dot.gov*.

SUPPLEMENTARY INFORMATION:

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Table of Abbreviations

AHAS Advocates for Highway and Auto Safety
AMI Acute Myocardial Infarction
AMSA American Moving and Storage Association
ANPRM Advance Notice of Proposed Rulemaking
APA Administrative Procedure Act
ATA American Trucking Associations
BAC Blood Alcohol Content
BLS U.S. Bureau of Labor Statistics
BMI Body Mass Index
CATF Clean Air Task Force
CDL Commercial Drivers License
CEQ Council on Environmental Quality
CFR Code of Federal Regulations
CHP California Highway Patrol
CMV Commercial Motor Vehicle
CRASH Citizens for Reliable and Safe Highways
CRMCA Colorado Ready Mixed Concrete Association
CTC Corporate Transportation Coalition
CVD Cardiovascular Disease
CVSA Commercial Vehicle Safety Alliance
dBA Decibels Adjusted
DE Diesel Exhaust
DOT Department of Transportation
EA Environmental Assessment
ECMT European Conference of Ministers of Transport
EEI Edison Electric Institute
EOBR Electronic On-Board Recorder
EPA U.S. Environmental Protection Agency
FARS Fatality Analysis Reporting System
FHWA Federal Highway Administration
FMCSA Federal Motor Carrier Safety Administration
FMCSR Federal Motor Carrier Safety Regulations
FMP Fatigue Management Program
FONSI Finding of No Significant Impact
FR Federal Register
GVWR Gross Vehicle Weight Rating
HEI Health Effects Institute
HOS Hours of Service
IBT International Brotherhood of Teamsters
ICC Interstate Commerce Commission
ICCTA ICC Termination Act of 1995
IIHS Insurance Institute for Highway Safety
IRP International Registration Plan
ISO International Standards Organization
LBP Lower Back Pain
LH Long Haul
LR Long Regional
LTL Less-Than-Truckload
MCMIS Motor Carrier Management Information System
MCSAP Motor Carrier Safety Assistance Program
MFCA Motor Freight Carriers Association
MPH Miles per Hour
MTA Minnesota Trucking Association
NACA National Armored Car Association
NAICS North American Industrial Classification System
NEPA National Environmental Policy Act
NHTSA National Highway Traffic Safety Administration
NIH National Institutes of Health
NIOSH National Institute for Occupational Safety and Health
NITL National Industrial Transportation League
NPRM Notice of Proposed Rulemaking
NPTC National Private Truck Council
NRMCA National Ready Mixed Concrete Association
NSSGA National Stone, Sand, and Gravel Association
NTSB National Transportation Safety Board
OMB Office of Management and Budget
OOIDA Owner-Operator Independent Drivers Association
OOS Out-of -Service
OSHA U.S. Occupational Safety and Health Administration
OTR Over-the-Road
PATT Parents Against Tired Truckers
PM Particulate Matter
PMC PubMed Central
PRA Paperwork Reduction Act of 1995
PVT Psychomotor Vigilance Test
RIA Regulatory Impact Analysis
RMA Risk Management Association
R&T Research and Technology
RODS Records of Duty Status
SBA Small Business Administration
SH Short Haul
SR Short Regional
STAA Surface Transportation Assistance Act
TCA Truckload Carriers Association
TIFA Trucks Involved in Fatal Accidents
TL Truckload
TOT Time-on-Task
TRB Transportation Research Board
UMTRI University of Michigan Transportation Research Institute
UPS United Parcel Service
USV Utility Service Vehicle
VIUS Vehicle Inventory and Use Survey
VMT Vehicle Miles Traveled
VSL Value of a Statistical Life
VTTI Virginia Tech Transportation Institute
WBV Whole Body Vibration

A. Legal Basis for the Rulemaking

This rule is based on the authority of the Motor Carrier Act of 1935 and the Motor Carrier Safety Act of 1984.

The Motor Carrier Act of 1935 provides that ''The Secretary of Transportation may prescribe requirements for—(1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and (2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation'' [49 U.S.C. 31502(b)].

The hours-of-service regulations adopted today deal directly with the ''maximum hours of service of employees of * * * a motor carrier [49 U.S.C. 31502(b)(1)] and the ''maximum hours of service of employees of * * * a motor private carrier'' [49 U.S.C. 31502(b)(2)]. The adoption and enforcement of such rules was specifically authorized by the Motor Carrier Act of 1935. This rule rests squarely on that authority.

The Motor Carrier Safety Act of 1984 provides concurrent authority to regulate drivers, motor carriers, and vehicle equipment. It requires the Secretary of Transportation to ''prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles.'' Although this authority is very broad, the Act also includes specific requirements: ''At a minimum, the regulations shall ensure that—(1) Commercial motor vehicles are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely; and (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators'' [49 U.S.C. 31136(a)].

This rule is based on the authority of the 1984 Act and addresses the specific mandates of 49 U.S.C. 31136(a)(2), (3), and (4). Section 31136(a)(1) of 49 U.S.C. deals almost entirely with the mechanical condition of commercial motor vehicles (CMVs), a subject not included in this rulemaking. The phrase ''operated safely'' in paragraph (a)(1) refers primarily to the safe operation of the vehicle's equipment, but to the extent it encompasses safe driving, this rule also addresses that mandate.

Before prescribing any regulations, FMCSA must also consider their ''costs and benefits'' [49 U.S.C. 31136(c)(2)(A) and 31502(d)]. Those factors are also discussed later.

B. Background Information

B.1. History of the Hours-of-Service Rule

The Interstate Commerce Commission (ICC) promulgated the first Federal hours-of-service regulations (HOS) in the late 1930s. The rules were based on the Motor Carrier Act of 1935. The regulations remained largely unchanged from 1940 until 2003, except for an important amendment in 1962. Prior to 1962, driver hours-of-service regulations were based on a 24-hour period from noon to noon or midnight to midnight. A driver could be on duty no more than 15 hours in a 24-consecutive-hour period. In 1962, among other rule changes, the 24-hour cycle was removed and replaced by minimum off-duty periods. A driver could ''restart'' the calculation of his or her driving and on-duty limitations after any period of 8 or more hours off duty.

Section 408 of the ICC Termination Act of 1995 (ICCTA) (Pub. L. 104–88, 109 Stat. 803, at 958) required the Federal Highway Administration (FHWA) to conduct rulemaking ''dealing with a variety of fatigue-related issues pertaining to commercial motor vehicle safety.'' In response, FHWA published an advance notice of proposed rulemaking (ANPRM) on November 5, 1996 (61 FR 57252). FMCSA was established as a separate Agency on January 1, 2000. At that time, responsibility to promulgate CMV regulations was transferred from FHWA to FMCSA, which published an hours-of-service Notice of Proposed Rulemaking (NPRM) on May 2, 2000 (65 FR 25540) and a final rule on April 28, 2003 (68 FR 22456). Technical amendments to the final rule were published on September 30, 2003 (68 FR 56208). Motor carriers and drivers were required to comply with the final rule on January 4, 2004.

FMCSA's 2003 rule did not change any hours-of-service requirements for motor carriers and drivers operating passenger-carrying vehicles. They were required to continue complying with the hours-of-service rules existing before the 2003 rule (see 68 FR 22461–22462). Changes in hours-of-service provisions in the new rule applied only to motor carriers and drivers operating property-carrying vehicles. Compared to the previous regulations, the 2003 rule: (1) Required drivers to take 10, instead of 8, consecutive hours off-duty (except when using sleeper berths); (2) retained the prior prohibition on driving after 60 hours on duty in 7 days or 70 hours in 8 days; (3) increased allowable driving time from 10 to 11 hours in any one duty period; and (4) replaced the so-called 15-hour rule (which prohibited drivers from driving after being on duty more than 15 hours, not including intervening off-duty time) with a 14-hour rule (which prohibited driving after the 14th hour after the driver came on duty, with no extensions for off-duty time). Note that the 15-hour limit had been cumulative—so it could be interspersed with off-duty time—while the non-extendable 14-hour limit was consecutive. Additionally, FMCSA allowed drivers to ''restart'' the calculations for the 60- and 70-hour limits by taking 34 consecutive hours off duty. Based on the data and research available at the time, FMCSA was convinced that these new rules constituted a significant improvement in the hours-of-service regulations, compared to the rules they replaced, by providing drivers with better opportunities to obtain off-duty time offering daily restorative sleep, thereby reducing the incidence of crashes wholly or partially attributable to drowsiness or fatigue.

On June 12, 2003, Public Citizen, Citizens for Reliable and Safe Highways (CRASH) and Parents Against Tired Truckers (PATT) filed a petition to review the new hours-of-service rule with the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). On July 16, 2004, the D.C. Circuit issued an opinion holding that the rule was arbitrary and capricious because the Agency failed to consider the impact of the rules on the health of drivers, as required by 49 U.S.C. 31136(a)(4). *Public Citizen et al.* v. *Federal Motor Carrier Safety Administration*, 374 F.3d 1209, at 1216. The D.C. Circuit noted, however, that neither Public Citizen nor the court was ''suggest[ing] that the statute requires the agency to protect driver health *to the exclusion* of those other factors [*i.e.*, the costs and benefits of the rule], only that the agency must consider it.'' *Id.* at 1217 (emphasis in original). Although FMCSA argued that the effect of driver health on vehicle safety had permeated the entire rulemaking process, the court said that driver health and vehicle safety were distinct factors that must be considered separately.

In *dicta* the court also stated that: (1) FMCSA's justification for increasing allowable driving time from 10 to 11 hours might be legally inadequate because the Agency failed to show how additional off-duty time compensated for more driving time, and especially

because it failed to discuss the effects of the 34-hour recovery provision; (2) splitting off-duty time in a sleeper berth into periods of less than 10 hours was probably arbitrary and capricious, because FMCSA itself asserted that drivers need 8 hours of uninterrupted sleep; (3) failing to collect and analyze data on the costs and benefits of requiring electronic on-board recording devices (EOBRs) probably violated section 408 of the ICC Termination Act, which requires FMCSA to ''deal with'' EOBRs; and (4) the Agency failed to address or justify the additional on-duty and driving hours allowed by the 34-hour recovery provision.

On September 1, 2004 (69 FR 53386), FMCSA published an ANPRM requesting information about factors the Agency should consider in developing performance specifications for EOBRs. As the Agency said in the preamble to that document, ''FMCSA is attempting to evaluate the suitability of EOBRs to demonstrate compliance with the enforcement of the hours-of-service regulations, which in turn will have major implications for the welfare of drivers and the safe operation of commercial motor vehicles.'' The ANPRM asked for comments and information, both on technical questions relating to EOBRs, and on the potential costs and benefits of such devices. The EOBR rulemaking has been and will remain separate from this hours-of-service rulemaking. (For additional discussion of EOBRs, see Section J.13.)

On September 30, 2004, the President signed the Surface Transportation Extension Act of 2004, Part V (Public Law 108–310, 118 Stat. 1144). Section 7(f) of the Act provides that ''[t]he hours-of-service regulations applicable to property-carrying commercial drivers contained in the Final Rule published on April 28, 2003 (68 FR 22456–22517), as amended on September 30, 2003 (68 FR 56208–56212), and made applicable to motor carriers and drivers on January 4, 2004, shall be in effect until the earlier of—(1) the effective date of a new final rule addressing the issues raised by the July 16, 2004, decision of the United States Court of Appeals for the District of Columbia in *Public Citizen, et al.* v. *Federal Motor Carrier Safety Administration* (No. 03–1165); or (2) September 30, 2005.'' (118 Stat. at 1154).

B.2. Notice of Proposed Rulemaking (January 24, 2005)

FMCSA published an NPRM on January 24, 2005 (70 FR 3339) to reconsider the 2003 rule and determine what changes might be necessary to correct the deficiencies identified by the court. The Agency used the 2003 rule as a proposal for the purpose of soliciting public comments, but also announced that ''[t]his rulemaking is necessary to develop hours-of-service regulations to replace those vacated by the Court'' (70 FR 3342). The NPRM asked a series of questions on driver health, sleep loss and deprivation, driving time, sleeper berths, and other subjects; the answers are discussed later. While awaiting the submission and review of docket comments, the Agency pursued a research program to identify relevant studies on the same issues; the results of that effort are also described in later sections of the preamble.

C. Executive Summary

Today's rule requires all drivers of property-carrying commercial motor vehicles (CMVs) in interstate commerce to take at least 10 consecutive hours off duty before driving, limits driving time to 11 consecutive hours within a 14-hour, non-extendable window after coming on duty, and prohibits driving after the driver has been on duty 60 hours in 7 consecutive days, or 70 hours in 8 consecutive days. Drivers may restart the 60- or 70-hour ''clock'' by taking 34 consecutive hours off duty.

These provisions are the same as those of FMCSA's 2003 final rule that was vacated by the U.S. Court of Appeals for the D.C. Circuit and then reinstated by Congress for the duration of fiscal year 2005. These limits, however, are significantly different from the pre-2003 HOS regulation, which required only 8 hours off duty before driving, allowed 10 hours of driving time, and prohibited driving after having been on duty for 15 hours (but allowed any off-duty time taken during the work shift to be excluded from the calculation of the 15-hour limit). The pre-2003 rule had no counterpart to today's 34-hour recovery provision. The recovery role was played by the 60- and 70-hour limits, the only element of the pre-2003 rule which has been adopted without change for property-carrying vehicles in today's rule.

The 14-hour driving window and the 10-hour off-duty requirement of today's rule combine to move most drivers toward a 24-hour cycle, which allows the body to operate in accord with its normal circadian rhythm and the driver to sleep on the same schedule each day. A driver may remain on duty after the 14-hour window closes or go off duty after the 11th hour of driving, in each case returning to work after 10 hours off duty on something other than a 24-hour cycle. Nonetheless, FMCSA believes that most drivers, most of the time, will go off duty at or before the end of the 14th hour, since their principal responsibility—driving—is illegal after that point. The circadian friendliness of today's rule is bolstered by the requirement for 10 consecutive hours off duty. This is enough time to enable drivers to get the 7–8 hours of sleep most people need to maintain alertness and prevent the onset of cumulative fatigue.

The original restart provisions were the 60- and 70-hour limits. Drivers could not drive after having been on duty for those periods until they had been off duty long enough to reduce their 7- or 8-day on-duty totals below the 60- or 70-hour threshold. These limits are being adopted in today's rule, but the Agency is also adding a second and more flexible recovery provision, as it did in 2003—the 34-hour restart. A 34-hour period gives a large majority of drivers the opportunity for two night sleep periods, and all drivers the opportunity for two consecutive 8-hour sleep periods separated by a full 18-hour day. Comments to the docket stated that the 34-hour restart provides far more flexibility than the 60- and 70-hour limits alone, enabling drivers to tailor their schedules to their business requirements while still spending more time at home.

Today's rule also creates a new regulatory regime for drivers of CMVs that do not require a CDL, provided they operate within a 150-mile radius of their work-reporting location. These drivers are not required to keep logbooks, though their employers must keep accurate time records, and the driver may use a 16-hour driving window twice a week. Driving time may not exceed the normal 11 hours, but the longer operational window twice a week enables short-haul carriers to meet unusual scheduling demands. Short-haul drivers rarely drive anything close to 11 hours, and available statistics show that they are greatly under-represented in fatigue-related accidents. On a per-mile basis, long-haul trucks are almost 20 times more likely to be involved in a fatigue-related crash. One study suggested that a contributing factor to this statistical imbalance is the variety of work short-haul drivers typically perform; variety seems to minimize fatigue.

The rule adopted today balances considerations of driver and public safety, driver health, and costs and benefits to the motor carrier industry—all factors the Agency is required to take into account. The provisions are described separately in the preamble, but they constitute an interconnected whole and cannot be adequately understood in isolation.

The rule addresses driver health issues in detail, and provides a lengthy explanation and justification for the requirements adopted today. FMCSA has examined a wide range of scientific evidence, independently collected, summarized, and reviewed by a health panel created at the Agency's request by the Transportation Research Board of the National Academies of Science. FMCSA has concluded that the operation of CMVs under this rule does not have a deleterious effect on the physical condition of drivers. Because relatively little of the available evidence was derived from motor carrier operations, the Agency had to evaluate and weigh information from different fields and adapt it to a trucking environment. We believe our conclusions accurately reflect a preponderance of the scientific data. The additional off-duty time provided by the rule, along with the 14-hour driving window, should have a particularly beneficial effect on drivers' sleep opportunities, and indirectly on their health as well. In an indication of the fatigue-reducing benefits of the 2003 rule, preliminary information on sleep habits under that rule shows drivers are getting, on average, at least an additional hour of sleep compared to the pre-2003 rule. There is no indication that drivers are averaging more hours of work, as opponents of the 2003 rule had feared.

The Agency has examined all of the data on crash risk. Virtually every study has weaknesses or limitations. The largest database on fatal truck crashes (Trucks Involved in Fatal Crashes, or TIFA) records accidents that occurred entirely under the pre-2003 HOS rule, when off-duty time could have been as short as 8 hours. Furthermore, while the crash risk reflected in TIFA data rises with the number of hours driven before the crash, the risk in the 11th hour generally reflects illegal driving, since the normal limit at the time was 10 hours. Also, despite being the largest database available, the data contain relatively few fatigue-related crashes after long hours of driving. All in all, we thus must be careful in applying this data to the 2003 rule or today's rule, where the minimum off-duty time is 25 percent greater.

On the other hand, we also examined recent data collected while the 2003 rule was in effect. Although this data suggests that fatigue-related crashes have fallen since the 2003 rule became effective, this newer data is mostly preliminary, self-reported without statistical controls, and also reflects small sample sizes, all of which—once again—sometimes leads to inconsistent findings.

The rule and the Regulatory Impact Analysis discuss the strengths and weaknesses of each data source and balance the shortcomings of one against the advantages of another. The TIFA data from 1991 to 2002 are very comprehensive. In order to ensure that its safety analysis erred on the side of caution, the Agency used TIFA data to estimate the risk of additional driving hours, knowing that the risk is probably over-stated given the better opportunities for restorative sleep available under the 2003 rule and today's final rule. It is also clear that newer CMVs, with their quieter and more comfortable cabs, are less fatiguing to drive. That change may also affect the usefulness of the TIFA data, though this factor is impossible to quantify.

Using the most conservative estimates of crash risk for a given amount of driving time, FMCSA's analysis shows that the safety differential between a 10-hour and an 11-hour driving limit is very small while the economic cost differential is very large. The operational and scheduling flexibility of an 11-hour limit, even when it is not utilized fully, is both economically and socially valuable. According to the drivers who commented to the docket, the 11-hour limit in the 2003 rule enables them to get home more often, when the 10-hour limit would leave them stranded at roadside, out of hours. It also allows them to get home without pushing quite as hard as they might be tempted to do under a 10-hour limit.

FMCSA examined a range of options and found that today's rule is the only one that is cost-beneficial, with a net annual benefit estimated at $270 million. Reducing driving time from 11 to 10 hours, while leaving the rest of today's rule intact, would increase net costs by $526 million per year. To confirm our findings, we conducted a sensitivity analysis of the data and assumptions used. We changed these parameters in a way that was unfavorable to today's rule in general and to allowing 11 hours of driving in particular. No parameters tested, either singly or in combination, produced a basis for either replacing the 11-hour driving limit with a 10-hour limit, or suggested that another option could be more cost-beneficial.

D. Research Review Process

In preparing this final rule, FMCSA thoroughly, systematically, and extensively researched both U.S. and international health and fatigue studies and consulted with Federal safety and health experts. In addition, FMCSA asked the Transportation Research Board (TRB) of the National Academies to contract with a research team of experts in the field of health and fatigue to prepare a summary of relevant literature through the TRB Commercial Truck and Bus Safety Synthesis Program. The literature review was conducted using two teams of health and transportation experts to identify and summarize the available research literature relevant to this HOS rulemaking. This review included research findings that discussed in a scientific, experimental, qualitative, and quantitative way the relationship between the hours a commercial motor vehicle driver works, drives, and the structure of the work schedule (on-duty/off-duty cycles, time-on-task, especially time in continuous driving, sleep time, etc.), and the impact on his/her health.

Dr. Peter Orris, M.D., Professor of Occupational Health at the University of Illinois, led a team of six prominent medical doctors, epidemiologists, and an ergonomist to identify relevant research on CMV driver health. Dr. Alison Smiley, President of Human Factors North Inc., Professor in the Department of Mechanical and Industrial Engineering, University of Toronto, and the Department of Civil Engineering, Ryerson University, led a team of three leading transportation and fatigue experts to review relevant fatigue studies. Each team conducted two literature reviews, a review of the literature at the beginning of the project and a review of the literature that was submitted by commenters to the 2005 NPRM. It was through this rigorous process that FMCSA ensured that not only the latest research, but the best available science was used to support this rulemaking. The final reports are located in the docket and are entitled ''Literature Review on Health and Fatigue Issues Associated with Commercial Motor Vehicle Driver Hours of Work,'' Part I and Part II.

The driver health team used PubMed Central (PMC), which is the U.S. National Institutes of Health (NIH) digital archive of biomedical and life sciences journal literature. PMC includes MEDLINE, which is the premier bibliographic database covering the fields of medicine, nursing, dentistry, veterinary medicine, the health care system, and the preclinical sciences. MEDLINE contains over 12 million bibliographic citations dating back to the mid-1960s and author abstracts from more than 4,800 biomedical journals published in the United States and 70 other countries.

The initial driver health literature search from 1975 to present resulted in

over a thousand research articles. The driver health team screened these studies based on relevance to the topics of commercial vehicle operator health and the health effects of work hours, shift work, and sleep schedules. A total of 55 of the relevant studies were reviewed in greater detail. Twenty-five were chosen and summarized by a primary reviewer to be included in the Part I final report. The criteria for inclusion were the validity of the methodology, the relevance of the studied population to truck driving, and the quality of the statistical analysis of health outcomes.

Similarly, the TRB driver fatigue team used the TRANSPORT database, a bibliographic database of transportation research and economic information produced by the 25-nation Organization for Economic Co-operation and Development, together with the United States TRB, and the 31 nations of the European Conference of Ministers of Transport (ECMT). TRANSPORT includes the Transportation Research Information Services, International Road Research Documentation, and ECMT's TRANSDOC.

Collectively these sources contain over 530,000 citations from publications, most with abstracts, of research information on all surface transportation modes, air transport, and highway safety. The driver fatigue team searched these studies for relevance concerning hours of service, and CMV operator performance and fatigue. Because FMCSA had previously docketed summaries of fatigue-related studies used in preparing the 2003 rule, the scope of this literature review was limited to studies published after 1995. Primary sources were selected if they addressed truck driver performance (on road or simulated), and included driving performance measures (vehicle control or critical incidents). Only studies were selected which involved drivers on typical work-rest schedules, involving extended hours of driving, driving in a sleep-deprived state, and/or driving at night. After the initial set of research reports was screened based on relevance, the driver fatigue team reviewed a total of 26 relevant studies, and 13 were chosen to be summarized for the Part I report.

As a result of the questions posed in the 2005 NPRM, commenters referenced over 200 studies. The driver health and fatigue teams reviewed the titles and abstracts of studies referenced by commenters using the identical criteria that were used for screening the initial research discussed earlier. Articles considered most relevant were those involving epidemiological studies, studies of CMV crash risk, or field studies of performance of commercial drivers in relation to fatigue issues such as daily and weekly hours, time of day, and short sleep, or studies of non-CMV drivers showing the effects of sleep loss and comparing sleep loss and alcohol impacts. The reasons for not reviewing the remaining articles suggested by commenters included the following: an article was not published as a report of a recognized Agency or in a peer-reviewed journal; an article was very general in nature (*e.g.* a discussion of circadian rhythm); or, an article was not sufficiently relevant to the task of CMV driving. The driver health team selected 11 of these studies to review and summarize for inclusion in the Part II report, while the driver fatigue team selected 21 studies for the Part II report.

In addition to reviewing the studies mentioned above, FMCSA internally reviewed, summarized, and evaluated research reports that were previously cited in the 2003 rule, 2004 litigation, 2005 NPRM, and driver fatigue and performance studies that were excluded from the TRB literature review (*i.e.*, published before 1996).

The Agency also assembled an intermodal team of experts on operator fatigue and health to help FMCSA further identify and analyze relevant research. The Federal agencies represented were the Federal Aviation Administration, Federal Railroad Administration, U.S. Coast Guard, and the National Institute for Occupational Safety and Health (NIOSH).

E. Driver Health

The D.C. Circuit held that FMCSA failed to consider the possibly deleterious effect of the 2003 hours-of-service rule on the physical condition of drivers, as required by 49 U.S.C. 31136(a)(4).

To assess driver health and better comprehend the impact of the findings, one must understand the differences in the types of relevant medical research. Epidemiology is the study of diseases in populations of humans or animals, specifically how, when, and where they occur. Epidemiology attempts to determine what factors are associated with diseases (risk factors). Epidemiological studies can never prove causation; that is, they cannot prove that a specific risk factor actually causes the disease being studied. Epidemiological evidence can only show that a risk factor is associated (correlated) with a higher incidence of disease in the population exposed to that risk factor. The higher the correlation the more certain the association, but it cannot prove the causation.

Another type of study is a dose-response study. A dose-response study is based on the principle that there is a relationship between a toxic reaction (the response) and the amount of substance received (the dose). Knowing the dose-response relationship is a necessary part of understanding the cause and effect relationship between chemical exposure and illness.

A third type of study is a case-control study, which investigates the prior exposure of individuals with a particular health condition and those without it to infer why certain subjects, the ''cases,'' become ill and others, the ''controls,'' do not. The main advantage of the case-control study is that it enables the study of rare health outcomes without having to track thousands of people. One primary disadvantage of a case-control study is a greater potential for bias. Because the health status is known before the exposure is determined, the study does not allow for broader-based health assessment.

These are important distinctions for the following discussion of the research on driver health, specifically regarding exposure to environmental stressors such as exhaust, chemicals, noise, and vibration. FMCSA has reviewed and evaluated the available and pertinent information concerning driver health, with emphasis on chronic conditions potentially associated with changes from the pre-2003 and 2003 rules, to this final rule. The research on CMV driver health falls into several broad categories: (1) Sleep loss/restriction, (2) exposure to exhaust, (3) exposure to noise, (4) exposure to vibration, (5) cardiovascular disease, (6) long work hours, and (7) shift work and gastrointestinal disorders.

E.1. Sleep Loss/Restriction

The lack of adequate sleep has been shown to have detrimental impacts on the overall health of humans. Research suggests that sleep deprivation adversely affects human metabolism as well as the endocrine and immune systems [Spiegel, K., *et al.* (1999), p. 1438]. Chronic partial sleep loss is associated with decreased glucose tolerance, decreased leptin levels, increases in evening cortisol levels, and adverse cardiovascular effects [Spiegel, K., *et al.* (2004), p. 5770]. Consistent with these studies, epidemiologic research demonstrates that short sleep duration is modestly associated with symptomatic diabetes [Ayas, N. T. *et al.* (2003), p. 383], cardiovascular disease, and mortality [Alvarez, G.G., & Ayas, N. T. (2004), p. 59]. Other studies have shown that short sleepers (less than 6

hours) have hormone and metabolic changes which result in weight gain [Hasler, G., *et al.* (2004), p. 661; Morikawa, Y., *et al.* (2003), p. 136; Taheri, S., *et al.* (2004), p. 210; Vioque, J., *et al.* (2000), p. 1683]. Interleukin 6 (IL–6) is a marker of systemic inflammation that may lead to insulin resistance, cardiovascular disease, and osteoporosis. Sleep loss of as little as two hours per night increases daytime IL–6 and causes drowsiness and fatigue during the next day, whereas post-deprivation decreases nighttime IL–6 and is associated with deeper sleep [Vgontzas, A. N., *et al.* (2004), p. 2125].

As to the amount of sleep necessary, the National Sleep Foundation recommends 8 hours per day. This standard comes primarily from studies by the National Institutes of Health (NIH), which notes that this was the mean time period that healthy young adults gravitated to when external influences were removed. Not all sleep researchers agree with this conclusion, particularly with regard to individual health and well-being. Two large-scale studies have found no relationship between longer sleep and better health [Kripke, D. F., *et al.* (2002), p. 131; Patel, S. R., *et al.* (2004), p. 440]. The epidemiological research on sleep duration suggests that mortality may even begin to rise with sleep durations greater than 8 hours. Likewise, mortality risk increases for short sleep durations less than 6 hours per day [*Id.*].

The research identified that prior to the 2003 HOS rule, CMV drivers were not getting enough sleep (*i.e.*, 7–8 hours per day) as needed to maintain individual health. In four major research studies, where sleep was verified using either an actigraph watch (wrist-worn monitoring device) or electroencephalogram, CMV drivers averaged from 3.8 to 5.25 hours of sleep per day [Dinges, D. F., *et al.* (2005), p. 38; Balkin, T., *et al.* (2000), p. 4–48; Mitler, M. M., *et al.* (1997), p. 755; Wylie, C. D., *et al.* (1996), p. ES–10]. These averages are below the 6 to 8 hours of sleep that are associated with lower mortality or a healthy lifestyle.

Preliminary data from the following sources suggest that, on average, CMV drivers are obtaining more sleep than before under the 2003 rule, which requires at least 10 consecutive hours of off-duty time. First, an ongoing joint National Highway Traffic Safety Administration (NHTSA) and FMCSA study conducted in 2005 found that drivers were averaging 6.28 hours of sleep per day, a figure that was verified with an actigraph watch [Hanowski, R.J., *et al.* (2005), p.1]. Second, in a survey of its membership, the Owner-Operator Independent Drivers Association (OOIDA) found that of the 1,264 drivers responding, 355 or 30 percent of drivers stated that they were getting more rest as a result of the 2003 HOS rule with 10 consecutive hours of off-duty time. The other 70 percent of the drivers responded that they were getting either the same amount of rest or no additional rest was needed as a result of the 2003 rule.

Comparing study findings before and after the 2003 HOS rule change suggests that drivers are getting more than an hour of additional sleep per night than they previously were able to obtain. While the Agency would like to see drivers obtain a sleep period between 7 to 8 hours per day to maximize driver alertness, the finding of 6.28 hours of sleep per night is within normal ranges consistent with a healthy lifestyle and is a vast improvement over previous sleep findings. Based on the research that led to the 2003 final HOS rule, FMCSA knew that short sleep (less than 6 hours) among drivers was a concern from both a safety and health standpoint. As a result, FMCSA increased off-duty time to 10 consecutive hours thereby increasing driver sleep by up to an additional two hours per day. This final rule adopts the requirement for the 10 consecutive hours of off-duty time.

E.2. Exposure to Diesel Exhaust

The Environmental Protection Agency's (EPA) Health Assessment Document for Diesel Engine Exhaust (2002) concluded that ''long-term (*i.e.*, chronic) inhalation exposure is likely to pose a lung cancer hazard to humans, as well as damage the lung in other ways depending on exposure'' [EPA (2002), p. ii].

Diesel exhaust (DE) is not a single ''thing'' but a mixture of hundreds of gases and particles, which differ with the type of engine generating them, operating conditions, and fuel formulations. Some of the components of DE are known carcinogens (*e.g.*, benzene) and others are mutagenic or toxic. Particulates from diesel engines, which constitute about 6 percent of the total ambient particulate matter (PM) with an aerodynamic diameter of 2.5 micrometers or less (PM–2.5), are highly respirable and able to reach the deep lung. Yet EPA has not formally declared DE to be a carcinogen. There are several reasons for this ambiguity.

A dose/response curve is the classic means of measuring the effect of exposure. A curve is typically established in a laboratory. Very high doses are given over a relatively short period, and the physiological response is measured. A dose/response curve is assumed to be a straight line, which can be extended downward to the lower exposures typical of ambient conditions outside the laboratory. If the dose/response curve is not a straight line (because the physiological response decreases disproportionately when exposure is reduced), the curve will overstate the effect of ambient exposure by some unknown amount. In that case, long-term population studies might be an alternative, provided long-term exposure can be established.

Attempts to establish a dose/response curve for DE have not produced clear-cut results. In animal studies, rats develop lung tumors after lifetime inhalation of DE at exposures vastly higher than any ambient condition; but these cancers appear to be at least partially the result of particle overload, which prevents lung clearance and causes chronic inflammation and subsequent lung disease. Chronic inhalation studies in mice show equivocal results, and hamsters do not develop cancer [Bunn, W.B., *et al.* (2002), p. S126; EPA (2002), p. 7–139]. EPA therefore concluded that ''the rat lung tumor response is not considered relevant to an evaluation of the potential for a human environmental exposure-related hazard'' [*Id.*]. EPA further noted that ''[t]he gaseous phase of DE (filtered exhaust without particulate fraction) was found not to be carcinogenic in rats, mice, or hamsters'' [*Id.*].

Although EPA has declared DE to be a ''probable human carcinogen,'' based in part on a review of 22 epidemiologic studies of workers exposed to DE in various occupations, it also noted that the

> ''Increased lung cancer relative risks generally range from 1.2 to 1.5, though a few studies show relative risks as high as 2.6. Statistically significant increases in pooled relative risk estimates (1.33 to 1.47) from two independent meta-analyses further support a positive relationship between DE exposure and lung cancer in a variety of DE-exposed occupations. The generally small increase in lung cancer relative risk (less than 2) observed in the epidemiologic studies and meta-analyses tends to weaken the evidence of causality. When a relative risk is less than 2, if confounding factors (*e.g.*, smoking, asbestos exposure) are having an effect on the observed risk increases, they could be enough to account for the increased risk'' [EPA (2002), pp. 7–138 and 7–139].

Overall, the evidence is not sufficient for DE to be considered a proven human carcinogen because of exposure uncertainties (lack of historical exposure data for workers exposed to DE) and an inability to reach a full and direct accounting for all possible confounders [*Id.*].

The actual cancer risk involved in operating a diesel-engine truck depends on the degree and duration of exposure to DE, and especially to smaller particulate matter (PM–2.5). Information on the real-world DE exposure of truck drivers is limited by many uncertainties. Because trucks spend a great deal of time in motion, the exposure levels of different highway, municipal, and regional environments have to be collected and combined. Idling time at terminals, in traffic jams, or while using a sleeper berth presumably generates higher exposure than does highway driving, but estimating the possible combinations of conditions for a large population of drivers is difficult. Furthermore, because of the long latency period of most cancers, the extent of the risk to truck drivers depends on the length of their exposure. This in turn is influenced by the factors that existed several decades ago: engine design, formulation of diesel fuel, prevalence of smoking among driver populations, total particulate levels from all sources, etc. In most cases, this information is less well known than comparable data on these factors today. Nor can one project previous (assumed) conditions forward or current conditions backward; virtually everything about DE has been changing in the last few decades and will continue to change as EPA tightens the regulations that govern diesel engine design and diesel fuel. Also, given EPA initiatives to reduce truck idling, and Federal financing available for idle-reduction programs, FMCSA expects additional reductions in exposure of CMV drivers to DE.

Before discussing the studies reviewed by the driver health team, it is useful to analyze a potential exposure effect of a feature of the 2003 rule, which is adopted in this final rule—the availability of additional driving and on-duty hours through the use of the 34-hour recovery provision. If utilized to the extreme, this would allow another 17 hours of driving time and 24 hours of on-duty time in a 7-day work week, compared to the limit of 60 hours of driving time without the recovery provision. To examine the effect of the 2003 rule on driver work hours, FMCSA compared an earlier survey of drivers operating under the pre-2003 rule with a recently completed survey. In a 7-day work week, the 451 drivers who responded to the earlier survey worked, on average (driving and other on-duty time), 64.3 hours per week [Campbell, K.L., & Belzer, M.H. (2000), p. 104]. In 2005, FMCSA evaluated a sample of driver logs and determined that the 489 drivers included, with a total of 5,397 7-day periods, worked an average of 61.4 hours (driving and other on-duty time) per week [FMCSA Field Survey Report (2005), p. 4].

At the annual meeting of the TRB in Washington, D.C. in January 2005, Schneider National, a large motor carrier, provided a distribution of the weekly (8-day period) on-duty hours for its drivers (available in the docket for this rule). The data shows that Schneider's employee drivers averaged 62 hours on duty per 8-day period and its leased drivers averaged 65 hours on duty per 8-day period. In addition, J.B. Hunt, another large motor carrier, in comments to the NPRM, reviewed the work records of 80 randomly selected over-the-road drivers for a 30-day period. J.B. Hunt found that 74 percent of its drivers used the 34-hour restart at least once during the 30-day period. On average, J.B. Hunt's drivers accumulated 62.25 hours on duty per eight-day period.

This data provides some indication of the hours worked as a result of the 2003 rule. Given the data from surveys and comments regarding work hours from motor carriers, it does not appear that CMV drivers are working on average significantly more hours as a result of the 2003 rule as compared to the pre-2003 regulation. Consequently, based on review of the data, the average exposure of drivers to DE has remained essentially unchanged.

The driver health team identified and reviewed four studies that address the issue of hours of work and duration of DE exposure in transportation workers. A large case-control study in Germany found significant associations between lung cancer and employment as a professional driver. The risk reached statistical significance for exposures longer than 30 years [Bruske-Hohlfeld, I., *et al.* (1999), p. 405]. An exposure response analysis and risk assessment of lung cancer and DE found a 1 to 2 percent lifetime increased risk of lung cancer above a background risk of 5 percent among workers in the trucking industry, based on historical extrapolation of elemental carbon levels [Steenland, K., *et al.* (1998), p. 220]. A large case-control study of bus and tramway drivers in Copenhagen found a negative association between lung cancer and increased years of employment [Soll-Johanning, H., *et al.* (2003), p. 25]. Finally, a meta-analysis of 29 studies addressing occupational exposure to DE and lung cancer showed that 21 of the 23 studies meeting the inclusion criteria, observed relative risk estimates greater than one (probability of a CMV driver developing lung cancer divided by the probability of the control group developing lung cancer). A positive duration response was noted in all studies that quantified exposure [Bhatia, R., *et al.* (1998), p. 84].

Several studies have shown an association between truck driving and bladder cancer. The driver health team reviewed three studies that addressed the association between duration of exposure to DE and bladder cancer. A population-based case-control study in New Hampshire found a positive association between bladder cancer and tractor-trailer driving, as well as a positive trend with duration of employment [Colt, J.S., *et al.* (2004), p. 759]. A large study in Finland found increased standard incidence ratios for six types of cancer in truck drivers. Cumulative exposure to DE was negatively associated with all cancers except ovarian cancer in women with high cumulative exposure [Guo, J., *et al.* 2004, p. 286]. A meta-analysis of 29 studies on bladder cancer and truck driving found an overall significant association between ''high'' exposure to DE and bladder cancer as well as a dose-response trend. The authors concluded that DE exposure may result in bladder cancer, but the effects of misclassification, publication bias, and confounding variables could not be fully taken into account [Boffetta, P., & Silverman, D.T. (2001), p. 125].

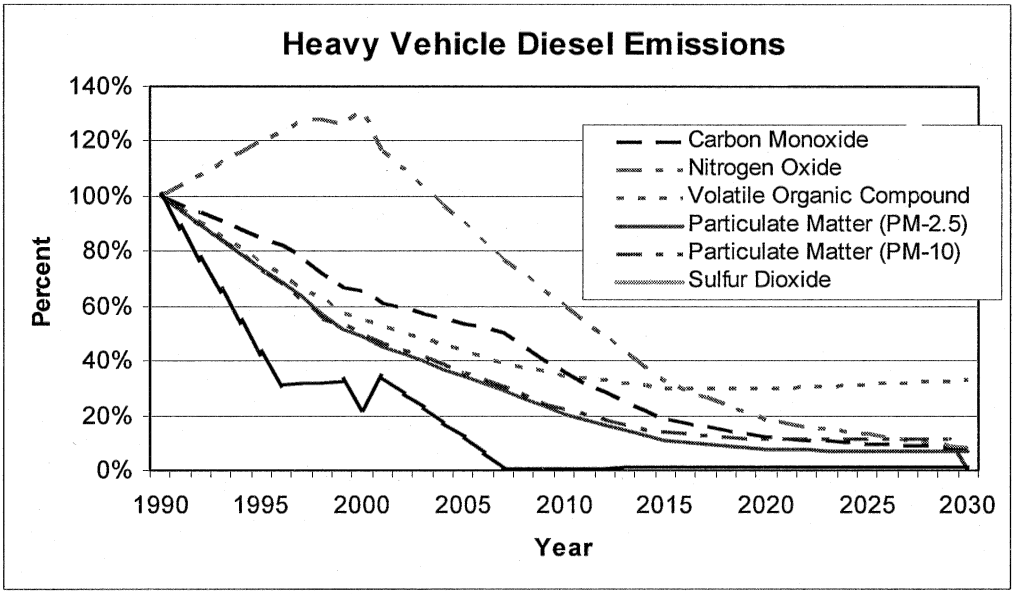
As a result of the number of studies showing an association, DE is considered to be a ''probable'' carcinogen by the World Health Organization and the U.S. Department of Health and Human Services' National Toxicology Program. Because of the complexity of proving a definitive link between DE and cancer, no organization, other than the California EPA, has classified DE as a known carcinogen [Garshick, E., *et al.* (2003), p. 17]. Studies have a great degree of uncertainty due to study design and exposure assumptions, measurement issues, and synergistic effects of various pollutants, among other variables. [Bailey, C.R., *et al.* (2003), p. 478]. Excluding rats, animal studies are overall negative with regard to lung tumor formation following DE exposure. In rats, lung tumors are produced by lifetime inhalation exposure to many different particle types. These exposures are characterized as ''lung overload;'' however, numerous analyses point to a lack of relevance of data from lung-overloaded rats to human risk calculations, particularly at environmental or ambient levels [Bunn, W.B., *et al.* (2002), p. S122]. As noted earlier, EPA's risk assessment on DE, based on long-term (chronic) exposure,

concludes that DE is ''likely to be carcinogenic to humans by inhalation.'' Studies show a causal relationship between exposure to DE and lung cancer, but EPA has not concluded that DE is a human carcinogen and cannot develop a quantitative dose-response cancer risk. The rat inhalation studies underpinning these findings resulted from overloading DE and are unrealistic exposure scenarios for humans [Ris, C. (2003), p. 35].

The acute (short-term) effects of DE, which would allow us to determine safe exposure levels, are not currently known [*Id.*]. Also, there are not enough human test data to make a definitive risk assessment on the chronic long-term respiratory effects of DE. Tests on animals, however, suggest chronic respiratory problems exist [*Id.*]. Cleaner burning diesel fuel standards (2006) combined with cleaner diesel engine technologies from more stringent emission standards (2007) will generate a net reduction in pollutant emissions, despite growth in diesel use [Sawyer, R.F. (2003), p. 39].

EPA models project on a national basis the amount of emissions or pollutants expected annually from all mobile sources. These are based on estimates of vehicle miles traveled and new vehicles entering and old vehicles leaving the inventory, and they reflect changes in vehicle emissions standards. The models project emissions for the following pollutants: Carbon Monoxide, Oxides of Nitrogen, Volatile Organic Compounds, Particulate Matter (PM–2.5), Particulate Matter (PM–10), and Sulfur Dioxide. EPA estimates show that vehicle emissions from all mobile sources have declined significantly from 1990 to 2005 (average 35 percent reduction in emissions) and are projected to decline further until 2030 (average 55 percent reduction in emissions). DE from heavy vehicles represents about 23 percent of all emissions from mobile sources. DE from heavy vehicles has also declined from 1990 to 2005 (average 55 percent reduction in emissions) and is projected to decline further until 2030 (average 88 percent reduction in emissions). The following chart shows the projections of heavy vehicle DE from the on-the-road fleet by type of emission from 1990 to 2030. The chart is based on U.S. EPA's ''National Annual Air Emissions Inventory for Mobile Sources,'' which was conducted for a variety of pollutants emitted by on-road vehicles. [EPA (January 2005)]. Mobile source emission inventories were directly modeled for 2001, 2007, 2010, 2015, 2020, and 2030. Other years were obtained by linear interpolation. EPA's Air Inventory was developed using the National Mobile Inventory Model [EPA (March 2005)].

Figure 1. Heavy Vehicle Diesel Emissions



Source of Data: EPA National Mobile Inventory Model

If diesel or all engine emissions are in fact carcinogenic (not yet proven), then the risk of developing cancer is a function of both the amount of DE being inhaled and cumulative exposure (time). Based on EPA emission projections of lower emissions from on-the-road heavy vehicles, continued reduction in health impacts can be expected over time.

It appears that chronic (long-term) exposure to DE may cause cancer. The exposure/dose required, however, is currently unknown due to the extreme difficulty in measuring and modeling exposure. EPA has noted that there is great

''uncertainty regarding whether the health hazards identified from previous studies using emissions from older engines can be applied to present-day environmental emissions and related exposures, as some physical and chemical characteristics of the emissions from certain sources have changed over time. Available data are not sufficient to provide definitive answers to this question because changes in DE composition over time cannot be confidently quantified, and the relationship between the DE components and the mode(s) of action for DE toxicity is unclear'' [Ris, C. (2003), p. 35].

Some of those flaws might be addressed by Garshick's effort to quantify lung cancer risk in the trucking industry through an epidemiological study using up to 72,000 subjects [Garshick, E., *et al.* (2002), p. 115]. At this time, however, according to EPA,

NIOSH, the Centers for Disease Control and Prevention, and NIH, there is not enough evidence to declare DE a carcinogen. Nonetheless, EPA's finding that DE is a probable carcinogen is a cause for concern. EPA has therefore adopted new diesel engine performance requirements and will by 2007 require refiners to produce low-sulphur fuel [66 FR 5002]. EPA's previous and forthcoming regulatory changes lead to a projection of dramatically lower DE through 2030, which will greatly reduce any health effects of DE exposure.

Still, the question remains whether today's rule, regarding exposure to DE, ensures that ''the operation of commercial motor vehicles does not have a deleterious effect on the physical condition'' of CMV drivers [49 U.S.C. 31136(a)(4)]. After reviewing all the studies mentioned, there is no evidence that today's rule has a deleterious effect. This is not to deny the possibility that DE may have some impact on truck drivers. The Agency, however, cannot attempt to address a problem without data on its extent and severity. The data on exposure to DE is notoriously deficient. As Garshick and his colleagues noted,

''The ideal marker of DE exposure would be a single marker that would be inexpensive, easy to measure, and clearly linked to the source of diesel emissions. However, the reality is that DE is a complex mixture, and in many real-life scenarios it may not be the only important source of exposure to the individual particles and gases that constitute DE. In addition, the mechanism of the health effects and specific causal agents are uncertain. The best diesel exposure marker is likely to be more complex and involve the measurements of molecular organic tracers and elemental carbon. The nature of the exposure assessment and marker chosen may also depend on mechanism of health effect postulated, and may include measurement of exhaust gases (such as ozone and nitrogen oxide) in the setting of nonmalignant respiratory diseases. Although current literature identifies DE as a health hazard, insight into a dose-response relationship is limited by factors related to both cohort selection and exposure assessment. The development of an exposure model in the existing DE epidemiologic literature is hindered by a lack of exposure measurements upon which an exposure model can be developed, uncertainty regarding the best measurement or marker(s) indicative of exposure, and uncertainty regarding historical exposures'' [Garschick, E., *et al.* (2003), p. 21].

One of the best works to date on DE, lung cancer, and truck driving is a series of studies by Steenland and his colleagues published between 1990 and 1998. The abstract of the 1998 study concludes that, ''[r]egardless of assumptions about past exposure, all analyses resulted in significant positive trends in lung cancer risk with increasing cumulative exposure. A male truck driver exposed to 5 micrograms/m^3 of elemental carbon (a typical exposure in 1990, approximately five times urban background levels) would have a lifetime excess risk of lung cancer of 1–2 percent above a background risk of 5 percent.'' The difference between 1 percent and 2 percent is obviously quite large, but the absence of a dose/response curve for DE and uncertainties in the exposure data make greater precision impossible.

In 1999, however, the Health Effects Institute (HEI), a non-profit corporation chartered in 1980 to assess the health effects of pollutants generated by motor vehicles and other sources, and supported jointly by EPA and industry, found significant flaws even in the 1998 Steenland study. As summarized by Bunn *et al.* [Bunn, W.B., *et al.* (2002), p. S127], the HEI found that the Steenland study ''quite likely suffers from an inadequate latency period, making it completely unsuitable for reaching any qualitative or quantitative conclusions about the link between DE exposure and lung cancer.'' Furthermore, the workers in the study were exposed to an inseparable mix of gasoline and diesel fumes. ''Indeed, during the 1960s (the critical years of the Steenland study from a latency perspective), diesel fuel represented only 4–7 percent of the total fuel sales (cars and trucks). Moreover, in the 1960s, gasoline-fueled vehicles had no after-treatment, so that emissions from gasoline-fueled vehicles likely would have been comparable to those from diesel vehicles'' [*Id.*].

Given the uncertain effects of exposure to DE, FMCSA could not include this factor in any cost/benefit analysis for any regulatory change it wished to consider. Some changes are beyond FMCSA's authority. EPA has exclusive authority to set emission standards for new trucks, and NHTSA has comparable jurisdiction over equipment standards for new vehicles. FMCSA retains a degree of authority to order the retrofitting of safety equipment to vehicles already in service [see 49 CFR 1.73(g)], but it is unclear what CMV equipment, if any, could be installed on the current fleet to reduce the driver's exposure to DE. A driver's ability to open one or both side windows could defeat any air-cleaning technology that might be added to the tractor, and all drivers spend time outside the vehicle at terminals, truck stops, and other locations where exposure to DE is unavoidable.

Another possible means of reducing drivers' DE exposure would be to curtail driving and on-duty time, or even to limit a driver's career to a certain number of years, all in the interest of improved health. As indicated above, however, there is no dose/response curve for DE and the Agency could not be sure that a given reduction in hours or years of service would produce a clear benefit. Forced retirement after a certain number of years on the job is especially problematical. There is nothing in the legislative history of 49 U.S.C. 31136(a)(4) to indicate that Congress wanted FMCSA to protect the health of drivers by limiting their livelihood. A limit on driving or on-duty hours for the specific purpose of reducing DE exposure seems unnecessary, because the available evidence shows that drivers have not increased their driving or on-duty time in response to the 2003 rule.

One of the benefits of the 2003 HOS rule has been that it limits driver duty periods to 14 consecutive hours per day with no extensions for intervening off-duty periods. Under the pre-2003 rule, drivers were allowed a 15-cumulative-hour duty period but could extend their maximum duty period indefinitely by taking off-duty time during their workday. This perpetuated the problem of excessive waiting time for pick up and delivery of freight at shippers and receivers, because the drivers were expected to place themselves in off-duty status while waiting. A 1999 study of dry freight truckload carriers by the Truckload Carriers Association (TCA) revealed that drivers spent nearly seven hours waiting for each freight shipment that they picked up and delivered.

The non-extendable 14-hour provision of the 2003 rule has given motor carriers greater leverage to insist that shippers and receivers reduce waiting time. At the 2005 Annual Meeting of the Transportation Research Board (TRB) in January 2005, in Washington, DC, several large carriers stated that as a result of the 14-hour rule, they are increasingly charging detention fees when shippers and receivers cause delays. As a result of the 14-hour provision, shippers and receivers have had to improve the efficiency and productivity of loading docks. Many drivers have commented that waiting time has been significantly reduced. Reduced waiting time has a positive impact on drivers. First, it reduces the total duty period for the driver, and reduces unproductive and often uncompensated time. Second, loading docks were cited by Garshick [Garshick, E. *et al.* (2003), pp. 24–25] as having high levels of DE particulate

matter. Thus, reduced waiting time reduces driver exposure to DE and could have beneficial impacts on driver health.

Diesel emissions have been falling steadily since the early 1990s and will continue to decline for many years to come. To whatever unknown extent DE may cause lung cancer, EPA's long-range regulatory program is expected to reduce that risk. Three recent developments may accelerate that downward trend. The first is the cost of diesel fuel, which makes idling more expensive. The second is the spread of local regulations that limit CMV engine idling time. The third is the proliferation of truck-stop services available to drivers that eliminate idling by providing hot or cold air for the sleeper berth, cable TV, and internet access through an attachment to the side window of the tractor. The expected reduction in engine idling in the next few years should amplify the health and environmental benefits of EPA's regulations. FMCSA has thus concluded that, while DE probably entails some risk to drivers, after a thorough review of the data available, it is the Agency's best judgment that, compared to the pre-2003 rule, today's rule neither causes nor exacerbates that risk.

E.3. Exposure to Noise

The Occupational Safety and Health Administration (OSHA) noise exposure standard for the workplace for unprotected ears is 90 decibels adjusted (dBA) limited to 8 hours per day (29 CFR 1910.95). FMCSA also has adopted a 90 dBA noise standard (49 CFR 393.94). Twenty-five percent of the work force in the United States is regularly exposed to potentially damaging noise [Suter, A.H., & von Gierke, H.E. (1987), p. 188]. In 1995, the FHWA Office of Motor Carriers conducted a study of noise in CMVs. The study showed that noise levels in CMV cabs as reported over the previous 25 years (1970–1995) had decreased [Robinson, G.S., *et al.* (1997), p. 36]. The following table summarizes noise findings from several studies:

FIGURE 2.—CMV CAB NOISE LEVELS DOCUMENTED FROM SEVERAL STUDIES

Study (year)	Model year (# of trucks)	dBA
Enone (1970)	1960s era (4)	>100 dBA.
Morrison & Clark (1972)	1960s era (16)	85–90 dBA.
Hessel (1982)	1972–1977 (8)	74–87 dBA.
Reif & Moore (1983)	1968–1978 (58)	85–90 dBA.
Morrison (1993)	1993 (4)	<80 dBA.
Micheal (1995)	1995 (6)	<80 dBA.
Van den Heever (1996)	1995 (16)	83 dBA.
Robinson (1997) [1]	1990–95 (9)	89 dBA.
Seshagiri (1998) [1]	400 measurements	83+ dBA.

Note 1: Study findings added to the table reported by Robinson (1997).

The truck-cab noise levels for nine trucks Robinson *et al.* evaluated were found to be 89.1 dBA for eight conditions of highway driving. This was very close to the FMCSA permissible exposure limit of 90 dBA. A sound dosimeter [1] was used to determine the noise doses experienced by 10 truck drivers during normal commercial runs of 8 to 18 hours. The noise doses were measured with rest breaks, meal breaks, and refueling breaks included, so they represented realistic projections of actual truck trip noise doses experienced by drivers. Robinson *et al.* also conducted pre- and post-workday audiograms for a group of 10 drivers. Those results indicated that CMV drivers suffered no temporary hearing loss after a normal driving shift.

In a more recent study of tractors of different models, makes, and ages operating on routes that covered different types of Canadian terrain, noise exposure was measured (over 400 measurements) under several conditions. The noise level recorded ranged from 78 to 89 dBA, with a mean of 82.7 dBA. The noise levels increased by 2.8 dBA with the radio on, 1.3 dBA with the driver's side window open, 3.9 dBA with both the window open and radio on, and 1.6 dBA for operations on four-lane highways. Cab-over-engine vehicles appeared to be quieter than conventional tractors by about 2.6 dBA. Long-haul (city to city) operations on hilly terrain appeared to be quieter than on flat terrain by about 2.2 dBA, probably indicating the strong effect of speed (tire, wind, and engine noise). These researchers found conditions where CMVs exceeded the Canadian noise limit of 85 dBA, mainly when the radio was on and the driver's side window open [Seshagiri, B. (1998), p. 205].

In its comments to the docket, the American Trucking Associations (ATA) reported that modern tractors usually have dBA levels ''in the low 70's'' and that a ''typical Class 8 sleeper tractor cruising at 60 mph on level ground pulling a load will have a sound pressure level of about 69–73 dBA.''

The research discussed earlier suggests cab noise levels are well within FMCSA's 90-dBA noise standard. The noise levels documented have not been shown to exceed OSHA or FMCSA standards. Therefore, the noise levels in CMVs should not result in significant hearing loss over a lifetime of on-the-job exposure, even if drivers drove the maximum hours allowed by this final rule.

E.4. Exposure to Vibration

Exposure to whole body vibration (WBV) is believed to cause fatigue, insomnia, headache, and ''shakiness'' shortly after or during exposure. After daily exposure over a number of years, WBV can affect the entire body and may result in a number of health disorders. Occupational exposure to WBV may contribute to circulatory, bowel, respiratory, muscular, and back disorders. The combined effects of body posture, postural fatigue, dietary habits, long hours, and loading and unloading are the possible other causes for these disorders.

Vibration in CMVs is a function of the age and maintenance of the vehicle, speed, type of roadway, and driving behavior and performance; and the most important variable is the condition of the roadway. There are no vehicle manufacturing or operational standards for the control of WBV, either in this country or abroad. The medical and research communities use the 1997 International Standards Organization (ISO) 2631–1 guidelines for evaluating WBV.

[1] A sound dosimeter is an instrument used to measure exposure to sound.

Teschke conducted a thorough review of the research on WBV and back disorders (including over 99 studies). This research found a number of potential risk factors associated with lower back pain (LBP). Besides WBV, the study identified a number of other confounding variables that are associated with lower back pain. The following risk factors have been found identified in the review of research in this area: (1) Driver's age, (2) working postures, (3) repeated lifting and heavy lifting, (4) smoking, (5) previous back pain, (6) falls or other injury-causing events, (7) stress-related factors including job satisfaction and control, and (8) body condition and morphology including weight, height, physical condition, and body type [Teschke, K., *et al.* (1999), p. 7]. The number of potential risk factors and confounding variables makes it difficult to isolate the effects of WBV, or even to conclude that WBV is the cause of lower back pain.

A recent study of volunteer drivers at a large transport company in Canada found that operators were not on average at increased risk of health effects from daily exposure when compared to the ISO guidelines. The study did, however, find several instances where drivers in a 10-hour shift were exposed to WBV levels established in an earlier ISO standard. These instances were highly correlated to road conditions [Cann, A.P., *et al.* (2004), p. 1432]. One of the criticisms of this study was that vibration was measured at the floor or base of the driver's seat, and measurements did not take into account the attenuation of vibration by the driver's seat. Most seats in CMVs today are air suspended to better isolate the driver from vibration.

Much of the WBV research is based on self-reporting through surveys and questionnaires to identify factors that are associated with lower back pain and back problems. For instance, a questionnaire study of bus and truck drivers in Vermont and one in Sweden found a significant association between long-term vibration dose and low back pain [Magnusson, M.L., *et al.* (1996), p. 710]. Another questionnaire survey in the Netherlands found significant associations between vibration and low back pain as well as a significant dose-response [Boshuizen, H.C., *et al.* (1990), p. 109]. A recent review of the health literature on WBV and lower back pain (LBP) concluded that, while ''there is probably an association between WBV and LBP,'' there was no evidence of dose-response [Lings, S. & Leboeuf-Yde, C. (2000), p. 290].

Studies addressing musculoskeletal disorders in truck drivers by and large evaluate the effects of WBV. A questionnaire survey of Japanese truck drivers found short resting time and irregular duty time to be significant risk factors for lower back pain. It also found positive but insignificant associations with long driving time per day and week, but the hours classified as long were not specified [Miyamoto, M., *et al.* (2000), p. 186]. A study of knee pain in taxi drivers found a significantly increased risk of knee pain in workers with more than 10 hours of daily driving. A significant dose-response trend was also seen [Chen, J.C., *et al.* (2004), p. 575].

Our review of the literature on WBV and its potential health effects, such as low back syndrome, is inconclusive because the studies rely primarily on self-reporting and application of risks derived from other environments. The literature related to commercial driving and other musculoskeletal disorders suffers from the same limitations. A causative relationship can only be viewed as suggestive within this context.

The studies that tested vibration in CMVs found that vibration was close to the ISO health risk threshold, but it did not consistently exceed the threshold. The introduction of new trucks, which reduce the driver's exposure to WBV, would be expected to mitigate any potential effects of vibration. ATA submitted comments to the docket that modern truck cabs are much quieter, are well ventilated, and have well designed, efficient heating and air conditioning units. Physical stress on drivers, including road vibration, is reduced by power steering. Many trucks are also equipped with automatic transmissions, further reducing stress. Improved suspension gives the driver a better ride, and provides better handling. ATA maintained that the comfort and safety improvements in truck tractors improve the driver's conditions, leading to a reduction in stress and fatigue. Two carriers also commented that modern trucks have greatly reduced noise and vibration.

Much of the research on whole body vibration within a CMV and its effects on lower back pain or musculoskeletal disorders was based on subjective measures and only weak associations have been found. Given all the other confounding factors that have been shown to be associated with these conditions (age, postures, lifting, smoking, falls, job satisfaction, and body condition, including weight) it is highly unlikely that vibration is the cause of LBP or musculoskeletal disorders. The few studies of more objective measures of vibration have not shown vibration to be, on average, above the health risk level (with ISO standard).

When comparing the 2003 HOS rule to today's rule, it is the Agency's best judgment that, based on the studies reviewed and comments received, WBV does not pose a significant health risk to CMV drivers.

E.5. Cardiovascular Disease

Cardiovascular disease (CVD), principally heart disease and stroke, is the nation's leading killer for both men and women among all racial and ethnic groups. Almost one million Americans die of CVD each year— 42 percent of all deaths. CVD does not kill just the elderly—it is also the leading cause of death for all Americans age 35 and older. More than 16 percent of the deaths due to CVD are individuals 35 to 64 years old. The causes of CVD are complex. The following table identifies some of the known risk factors:

FIGURE 3.—RISK FACTORS FOR CARDIOVASCULAR DISEASE

Individual factors	Occupational factors	Lifestyle factors
Genes		
Age	Sedentary Work	Smoking
Gender	Working Long Hours	Alcohol/Drug Use
High Cholesterol	Work Stress	Sedentary Lifestyle
Amino Acid—Homocysteine	Exposure to Physical Stressors and Injuries	Lack of Exercise
High Blood Pressure	Shift Work	Stress
Obesity		Short Sleep
Diabetes		

Source: American Heart Association.

The NIOSH representative to FMCSA's health group reviewed the literature regarding CMV driving and the risk of developing CVD. Since 1992, a number of population research studies from Sweden and Denmark have presented data suggesting an association between driving and CVD. In contrast to occupational studies undertaken in the United States, these research studies did not attempt to quantify ''hours of service driving a truck'' or ''occupational chemical and particulate exposures.'' Thus, these studies provide no data that could be used to correlate individual or group ''exposures'' and CVD outcomes. No studies conducted in the United States were found that permitted examination of long hours of driving among truck drivers and the possible association with CVD.

Swedish and Danish population studies provide support for the hypothesis that driving occupations have elevated risks for cardiovascular disease. Among drivers, Swedish population studies indicate the greatest risk elevations occur among bus drivers, with relative risks ranging from 50 percent to 114 percent in excess of comparison populations [Bigert, C., *et al.* (2003), p. 333]. The greatest risk ratio reported for truck drivers (a relative risk of 1.66), was reduced to 1.10 following statistical adjustment for competing health and disease risk factors. A recent study suggests that truck drivers experience no more than a 14 percent elevated risk [Bigert, C., *et al.* (2004), p. 987].

Most epidemiologists take a fairly rigorous view of relative risk values. In observational studies, results are not normally accepted as significant if a relative risk ratio is less than 3 and is never accepted if the relative risk ratio is less than 2 [Brignell, J. (2005)]. In epidemiologic research, increases in risk of less than 100 percent are considered small and are usually difficult to interpret. Such increases may be due to chance, statistical bias, or the effects of confounding factors that are sometimes not evident.

A number of Japanese hospital record studies have examined the association between long hours of work (not hours of driving) and acute myocardial infarction (AMI). The most recent study suggests that weekly work time in excess of 60 hours is related to increased risk of AMI [Liu, Y., & Tanaka, H. (2002), p. 447]. This research suggests a two-fold increased risk for overtime work (crude risk of 2.1, reduced to 1.81 after statistical adjustment for competing health and disease risk factors). The authors conclude that overtime work and insufficient sleep may be related to the risk of AMI.

Research is under way at NIOSH to evaluate mortality risk of independent truck drivers in the United States. However, this study is not designed to collect data on hours of service and other CVD risk factors.

FMCSA's NIOSH representative concluded that current research suggests the presence of only a weak association between CVD and truck driving. Additionally, CVD is associated with many other occupational types. No research studies were found that permitted an examination of whether additional hours of driving a CMV impacts driver health as measured by increased CVD or AMI. After thoroughly reviewing the collective data, in the Agency's best judgment, based on the research available, nothing implicates today's HOS rule in a heightened risk of CVD or AMI.

Any increased risk of CVD or AMI may be mitigated by the increased off-duty time (10 hours off duty) as well as the increase in stabilization from the pre-2003 rule to the 2003 and today's rule of the drivers' schedules (circadian rhythm). Changes implemented in truck cab design, reducing exposure to exhaust, whole body vibration, and noise may also mitigate the risk of CVD and AMI as well.

E.6. Long Work Hours

The average number of hours worked in the United States annually has increased over the past several decades and currently surpasses most countries in Western Europe and Japan [Caruso, C.C., *et al.* (2004), p. 1]. Worker health and safety is a growing area of concern, and thus more attention is being placed on whether there should be limits on hours of work—similar to the hours of service regulations for CMV drivers. The primary question being asked is whether there are more adverse health consequences as a result of longer hours of work.

Beyond the previous study mentioned regarding CVD and long hours [Liu, Y., & Tanaka, H. (2002), p. 447], the driver health team was able to find only one other study that met their selection criteria and was directly related to CMV drivers and long work hours [Jansen, N.W.H., *et al.* (2003), p. 664]. This study focused on employees from 45 companies in the Netherlands. Self-administered questionnaire data from 12,095 employees of the Maastricht Cohort Study on Fatigue at Work were used. The researchers concluded that employees needed greater recovery because their recovery scores (subjective measure of the self-perceived need for rest) were significantly elevated in those working 9 to 10 hours per day, more than 40 hours per week, and frequent overtime [*Id.*].

The lack of research literature on driver work hours required the driver health team to expand its literature review into occupations other than transportation workers. Particularly useful was a study published by NIOSH in April 2004 entitled ''Overtime and Extended Work Shifts: Recent Findings on Illnesses, Injuries, and Health Behaviors'' [Caruso, C.C., *et al.* (2004)]. The NIOSH report documents published research on long work hours (greater than 8 hours work per day) and an extended work week (greater than 40 hours per week).

The NIOSH review generally concluded that long work hours appear to be associated with poorer health, increased injury rates, more illnesses, or increased mortality. NIOSH found that individuals working long hours generally have greater risk of unhealthy weight gain, increased alcohol use, increased smoking, increased health complaints, increased injuries while working, poorer neuropsychological performance, reduced vigilance on task measures, reduced cognitive function, reduced overall job performance, slower work, and decreased alertness and increased fatigue, particularly in the 9th to 12th hours of work. The adequacy of these study findings is addressed later in this section of the preamble.

The NIOSH review examined the relationship between hypertension (a risk factor for CVD) and long hours. It concluded that the research findings regarding hypertension were inconsistent. Park [Park, J., *et al.* (2001), p. 244] found no correlation between the hours worked by Korean engineers, whose work hours during the previous month ranged from an average of 52 hours to a high of 89 hours per week, and increased hypertension. This study is relevant because the work-hour limits are reasonably close to the limits a CMV driver could work under this final rule.

CMV drivers, on average, work slightly more than 60 hours per week, but FMCSA operational data show they rarely reach the maximum of 84 work hours per week. This number of work hours is beyond the typical number of work hours examined by the research in the NIOSH review. The NIOSH review did, however, examine three studies that identified the relationship between very long shifts and immune function or performance. Nakano [Nakano, Y., *et al.* (1998), p. 32] reported better immune function in taxi drivers who were allowed to work overtime as compared with drivers having work-hour

restrictions. This study examined taxi drivers working 48-hour or longer shifts in 1992 and again in 1993. Leonard [Leonard, C., *et al.* (1998), p. 22] reported declines in two tests of alertness and concentration in medical residents who had worked 32-hour on-call shifts. They reported no significant declines in a test of psychomotor performance or a test of memory. A survey of anesthesiologists linked long working hours to self-reported clinical errors [Gander, P.H., *et al.* (2000), p. 178].

Two studies in the NIOSH review identified the relationship between long hours and compensation. Siu and Donald [Siu, O.L., & Donald, I. (1995), p. 30] and van der Hulst and Geurts [van der Hulst, M., & Geurts, S. (2001), p. 227] suggested that compensation may reduce adverse effects of long work hours. Siu and Donald [Siu, O.L., & Donald, I. (1995), p. 31] reported a relationship between perceived health status and overtime pay. Men from Hong Kong who received no payment for overtime reported more health complaints when compared with men who received payment. In addition, van der Hulst and Geurts examined the relationship between reward and long working hours in Dutch postal workers. Rewards included salary, job security, and career opportunities. They reported that high pressure to work overtime in combination with low rewards was associated with a three-fold increase in the odds for somatic complaints as compared with a reference category of low overtime pressure in combination with high rewards. Alternatively, high pressure in combination with high rewards did not differ from the reference category. [van der Hulst, M., & Geurts, S. (2001), p. 227] This research suggests that if workers are adequately compensated for their time, they are less likely to have health complaints. This is an important variable that can play a significant factor in conducting subjective types of research on the effects of long work hours and health. It also raises concerns regarding most subjective data regarding the health consequences of long hours that do not look at compensation as a factor.

With regard to the relationship between long work hours and worker health, the NIOSH review concluded that ''research questions remain about the ways overtime and extended work shifts influence health and safety. Few studies have examined how the number of hours worked per week, shift work, shift length, the degree of control over one's work schedule, compensation for overtime, and other characteristics of work schedules interact and relate to health and safety. Few studies have examined how long working hours influence health and safety outcomes in older workers, women, persons with pre-existing health problems, and workers with hazardous occupational exposures.''

The NIOSH review of the literature on long work hours documents a significant lack of data on general health effects. NIOSH reported that even when looking at fatigue and accidents, identifying ''differences between 8-hour and 12-hour shifts [is] difficult because of the inconsistencies in the types of work schedules examined across studies. Work schedules differed by the time of day (*i.e.*, day, evening, night), fixed versus rotating schedules, speed of rotation, direction of rotation, number of hours worked per week, number of consecutive days worked, number of rest days, and number of weekends off'' [Caruso, C.C., *et al.* (2004), p. IV].

Additionally, van der Hulst conducted a review of 27 recent empirical studies of long work hours [van der Hulst, M. (2003), p. 171]. He showed that long work hours are associated with some adverse health outcomes as measured by several indicators (CVD, diabetes, disability retirement, subjectively reported physical health, subjective fatigue). He concluded, however, ''that the evidence regarding long work hours and poor health is inconclusive because many of the studies reviewed did not control for potential confounders. Due to the gaps in the current evidence and the methodological shortcomings of the studies in the review, further research is needed.''

The driver health team found very little research to evaluate specifically the association between long work hours and CMV driver health. No research studies were found that permitted an examination of whether additional hours of driving or non-driving time would impact driver health. Research on other occupations is mixed and does not show conclusively that long hours alone adversely affect worker health. Also, FMCSA's 2005 survey of driver hours indicates that the 2003 rule has not increased the overall number of hours a driver actually works (see Section I.1). Overall, this rule improves driver health compared to the pre-2003 and 2003 rules through a combination of provisions (see discussion of Combined Effects, Section J.11). The Agency has adopted the non-extendable 14-hour driving window and the 10-hour off-duty requirement; these provisions shorten the driving window allowed before 2003 by one hour (or more, in some cases) and lengthen the off-duty period by two hours. In short, based on current knowledge and the limited research that is available, in the Agency's best judgment there is no evidence that the number of work hours allowed by the HOS regulation adopted today will have any negative impact on driver health.

E.7. Shift Work and Gastrointestinal Disorders

The term ''shift work'' covers a wide variety of work schedules and implies that shifts rotate or change according to a set schedule. These shifts can be either continuous, running 24 hours per day, 7 days per week, or semi-continuous, running 2 or 3 shifts per day with or without weekends. Workers take turns working on all shifts that are part of a particular system. Shift work is a reality for about 25 percent of U.S. workers. Similarly, 22 percent of CMV drivers work between the hours of 12 p.m. and 6 a.m. [Campbell, K.L., & Belzer, M.H. (2000), p. 115].

This final rule is intended to make work schedules more regular by adhering more closely to a 24-hour clock than the pre-2003 rule. It increases the number of consecutive off-duty hours to 10 and provides for a non-extendable daily driving window of 14 hours. The pre-2003 rule provided only 8 hours of consecutive off-duty time and prohibited driving after a cumulative total of 15 hours on duty per day. Under that rule, however, drivers could extend the 15-hour limit by taking off-duty time. Today's rule should provide some health benefits to CMV drivers, because, as previously shown, drivers are getting more consecutive hours of sleep and will generally adhere more closely to a 24-hour clock (14 hours on-duty and 10 hours off-duty = 24 hours).

By minimizing on-duty time and maximizing driving time, however, a driver could operate on a backward rotating 21-hour schedule (11 hours driving and 10 hours off duty = 21 hours). Although drivers might conceivably employ that schedule, data suggests drivers do so only rarely. Even when it does occur, this schedule is still beneficially closer to 24 hours than the pre-2003 rule, which allowed a backward rotating 18-hour work day (10 hours driving and 8 hours off duty = 18 hours).

The driver health team examined research on the health effects of disrupting the circadian rhythm. The circadian rhythm spans about a twenty-four-hour day, exemplified by the normal sleep-waking cycle. Circadian rhythms in humans originate from a clock circuit in the hypothalamus that is set by information from the optic nerve

about whether it is day or night. One of the earliest studies and most definitive works in the area of shift work by Taylor and Pocock showed no relationship between shift work and mortality [Taylor, P.J., & Pocock, S.J. (1972), p. 201]. Two recent studies used experimental conditions to evaluate the impact of an altered circadian rhythm on insulin secretion. The first [Morgan, L., *et al.* (1998), p. 449] found a longer sleep-wake cycle, such as might occur in rotating shift work, to be associated with increased insulin resistance and glucose response. In the second study, 261 shift workers completed a Standard Shift Work survey in an investigation of health and well-being [Barton, J., & Folkard, S. (1993), p. 59]. Workers using a forward rotating schedule were more likely to complain of digestive and cardiovascular disorders than those on a backward rotating system. This finding is counterintuitive because most fatigue and shift work research suggests that a forward rotating schedule is better from a sleep and fatigue standpoint. The authors concluded that the combination of direction of rotation and length of break when changing from one shift to another may be a critical factor in the health and well-being of shift workers [*Id.*, p. 63].

In a thorough review of the literature on shift work and health up to 1999, Scott [Scott, A.J. (2000), p. 1057] concluded that gastrointestinal, CVD, and reproductive dysfunctions are more common in shift workers, and that these effects may be due to rotating or fixed shifts, number of nights worked consecutively, predictability of schedule, and length of shift and starting time. Exacerbation of medical conditions such as diabetes, epilepsy, and psychiatric disorders, as well as the diseases noted above, may occur due to sleep deprivation and circadian rhythm disruption. It should be noted, however, that individuals with these conditions would not generally be qualified to drive under FMCSA's medical standards.

˚ In a more recent study, Ingre and Akerstedt [Ingre, M., & Akerstedt, T. (2004), p. 45] investigated the effects of lifetime accumulated night work based on monozygotic (from a single egg) twins. The authors studied 169 pairs of twins where one of the two twins worked night shifts while the other twin worked day shifts. The subjects were all over 65 years old and retired. The study found no significant difference between education, weight, body mass index (BMI), diurnal or circadian rhythm, habitual rise times, habitual bed times, and sleep times. The study found that the twin exposed to night work was significantly more likely than the twin exposed to day work to report lower ratings of subjective health (17.8% versus 10.7% who stated that their health was poor). The study did not look at objective measures of health. The most significant finding was how similar the twins remained and that shift work did not adversely affect important health measures (such as BMI, weight, sleep habits).

The general consensus in the shift work research community therefore is that while certain work schedules may result in health problems, there are few epidemiological studies of shift workers, and more empirical data is needed. Furthermore, no aspect of the 2003 rule or this final rule promotes the use of shift work within the transportation industry. FMCSA knows that some drivers will drive at night because of backward rotations of schedules or as a result of their preference to drive at night. The rule is ''shift-neutral'' with regard to driving during the daytime or nighttime. Therefore, in the Agency's best judgment, this final rule should pose no greater risk to driver health than the pre-2003 and 2003 rules with respect to shift work. By promoting 24-hour cycles, today's rule should, in point of fact, aid driver health in regard to shift work.

E.8. Efforts to Improve CMV Driver Health

Recognizing the important role that driver health and wellness play in driver safety, performance, job satisfaction, and industry productivity, FMCSA began a research project in May 1997 to design, develop, and evaluate a model truck and bus wellness program. The results of the research led to the creation of the ''Gettin'' in Gear'' program to create heightened awareness of and interest in driver health and wellness. Materials from this program were distributed within the truck and bus industry and provided basic health, nutrition, and fitness information to CMV drivers. The ''Gettin'' in Gear'' program was found to have a positive health impact on drivers who participated in the program, both initially and when the Agency followed-up with participants [Roberts, S., & York, J. (1999), pp. 15–28]. This was shown in both lifestyle habits (*e.g.*, exercising, resting, eating balanced meals) and physical data (*e.g.*, body mass index; pulse; diastolic blood pressure; aerobic, strength, and fitness levels).

In addition, FMCSA has assessed the prevalence of sleep apnea among CMV drivers and the safety impacts of this condition. FMCSA is currently working with the National Sleep Foundation to develop an education and outreach program to inform the motor carrier industry of the problem of sleep apnea and how it can be effectively addressed.

E.9. Driver Health Summary

Today's rule provides for 10 hours of consecutive off-duty time, giving drivers the opportunity to obtain 7 to 8 hours of restorative sleep per day. Research on the implementation of the 2003 rule shows that drivers are sleeping 6.28 hours of verified sleep and this is within normal ranges consistent with a healthy lifestyle. Actually, the data shows that, compared to pre-2003, drivers are on average sleeping more than an hour longer per day.

On the issue of exposure, FMCSA has not found any evidence that drivers are working significantly longer hours as a result of implementation of the 2003 HOS rule, although it would be permissive. While exposure to diesel exhaust may pose a cancer risk, no definitive link has been yet established. Without a definitive link it is impossible to determine the actual risk or estimate the societal costs of DE to CMV drivers' health. However, based on EPA estimates of lower emissions (starting in 1990 and continuing until 2030), and the fact that drivers do not appear to be working longer hours, the Agency believes that any potential health risk to CMV drivers already has been reduced and will be reduced more in the coming years.

The noise levels documented in the research have not been shown to exceed OSHA or FMCSA standards. Therefore, the noise levels in CMVs should not result in a significant risk of hearing loss. The studies that tested vibration in CMVs found that on average vibration was close to the ISO health risk threshold, but it did not consistently exceed the threshold. Changes in CMV cabs, diesel fuel, and engine designs appear to have greatly reduced any potential health risks associated with CMV driving. These changes have reduced drivers' exposure to diesel exhaust, vibration, and noise. The research has shown that exposure to these stressors do not to pose a significant health risk to CMV drivers.

The research suggests the presence of only a weak association between CVD and truck driving. No research studies were found that permitted an examination of whether additional hours of driving a CMV impacts driver health as measured by increased cardiovascular disease or myocardial infarction. In the Agency's best judgment, based on the research available, nothing implicates today's

HOS rule in a heightened risk of CVD or AMI.

The research on long hours and driver health is very limited. Research on other occupations is mixed and does not show conclusively that long hours alone adversely affect worker health. Also, FMCSA has not found any evidence that drivers are working significantly longer hours as a result of the 2003 rule. Therefore, the Agency has concluded that there is no clear evidence that the number of work hours allowed by the HOS regulation will have any impact on driver health.

While it is generally believed that shift work may result in health problems, there are few epidemiological studies conducted on shift workers. The most definitive research of shift work and health showed no relationship between shift work and worker mortality. A recent study of twins suggests that shift work does not alter important health measures (such as BMI, weight, and sleep). Regardless, today's rule is ''shift-neutral'' with regard to driving during the daytime or nighttime. Therefore, as previously stated, in the Agency's best judgment this final rule should pose no greater risk to driver health with respect to shift work.

F. Driver Fatigue

Over the past decade FMCSA has been conducting research and reviewing the literature on driver fatigue in support of its effort to revise the Agency's HOS regulations. In preparing this final rule, FMCSA internally reviewed and evaluated numerous research reports that were published prior to 1995. The TRB driver fatigue team already mentioned conducted a literature review to identify studies concerning hours of service and CMV driver performance and fatigue published after 1995. Additionally, the driver fatigue team reviewed additional studies that were referenced in the comments to the 2005 NPRM. The pertinent information from all these reviews was used in guiding the development of this rule and is discussed in context under the relevant provisions in Section J of this preamble. This section provides a discussion of driver fatigue research relevant to the various provisions finalized in today's rule. The following subsections will discuss research on: (1) Issues related to driver fatigue (2) Circadian influences (3) Driving, duty, and off-duty times, (4) Split-sleep, (5) Recovery, and (6) Short haul. In addition, the Agency's current and future fatigue research activities are discussed in Section G of this preamble.

F.1. Issues Related To Driver Fatigue

This regulation addresses the phenomenon of driver fatigue, *i.e.*, the partial and at times total loss of alertness resulting from insufficient quantity or quality of sleep. Sleep plays a critical role in restoring mental and physical function, as well as in maintaining general health. For most healthy adults, 7 to 8 hours of sleep per 24 hour period appears to be sufficient to avoid detrimental effects on waking functions. Young adults, for example, report sleeping an average of 7.5 hours per night during the week and 8.5 during the weekend [Carskadon, M.A., & Dement, W.C. (2005), p. 18]. In a laboratory study that compared the performance of two groups of subjects that spent 7 and 9 hours in bed, respectively, performance improved throughout the study. With 7 hours in bed, impaired performance was only found on the more sensitive tasks [Balkin, T., *et al.* (2000), p. ES–8]. Time in bed does not necessarily equate to time asleep; and time asleep does not always equate to quality sleep. For example, eight hours in bed is not likely to yield the same restorative benefit for someone with a sleep disorder or someone sleeping in a noisy, hot/cold, or otherwise uncomfortable environment, as it does for a ''normal'' sleeper. Studies of shiftworkers show that a given number of hours of sleep obtained during the late morning (waking hours) does not yield the equivalent amount of restorative sleep as the same number of hours obtained during the late night/early morning (sleeping) hours [Monk, T. H. (2005), p. 676].

F.2. Circadian Influences

Humans ''are biologically wired to be active during the day and sleepy at night'' [Monk, T. (2005), p. 674]. We have a homeostatic drive to sleep that interacts with the circadian cycle [Van Dongen, H.P.A., & Dinges, D.F. (2005), p. 440]. It has been well established that mental alertness and physical energy rise and fall at specific times during the circadian cycle, reaching lowest levels between midnight and 6 a.m., with, for some people, a lesser but still pronounced dip in energy and alertness between noon and 6 p.m. [Van Dongen, H.P.A., & Dinges, D.F. (2005), p. 439]. To stay alert throughout one's waking period, especially during these circadian troughs, most adults require 7 to 8 hours of quality sleep per day. Sleep obtained during the daylight hours of the circadian cycle is generally of poorer quality than sleep obtained during the nighttime/early morning ''sleeping hours.'' Working/driving during the ''third shift'' (midnight to 6 a.m.) has the combined effect of affording poorer quality daytime sleep, while requiring the driver to work/drive during times when the physiological drive for sleep is strongest. Changes of two or more hours in sleep/wake times cause one to become out of phase with the circadian cycle. This disrupts the synchronization of behavioral and biological processes (*e.g.*, cognitive performance, sleep, digestion, and body temperature), often resulting in increased fatigue and performance decrements. Circadian de-synchronization results from irregular or rotating shifts, especially those that are not anchored to a 24-hour day (*i.e.*, that start and end at different times each day), resulting in poor quality sleep and leading to accumulated fatigue. Backward rotating shifts that start an hour or more earlier each day also cause one to become out of sync with the circadian cycle, restricting sleep and leading to cumulative fatigue. ''Forward rotating shifts—starting at a later time each day— are not as good as a non-rotating shift, but are more compatible with the properties of the circadian system than are backward-rotating shifts.'' [Czeisler, C.A., *et al.* (1982), p. 462]. The importance of maintaining a 24-hour day was highlighted in the 1998 HOS expert panel report [Belenky, G., *et al.* (1998), p. 5].

The effects of the circadian cycle on driver alertness are addressed in this final rule in the 14-hour maximum on-duty and 10-hour minimum off-duty provisions (see Sections J.6 and J.7), which move drivers closer to a 24-hour day, while allowing some scheduling flexibility. This rule is far better than the pre-2003 HOS rule which allowed a backward-rotating schedule of 18 hours per day. Being more closely aligned to a 24-hour circadian cycle will allow drivers to obtain better rest, mitigate driver fatigue, and improve CMV safety.

F.3. Driving, Duty, and Off-Duty Times

A review of the past and current research provides support for adopting a maximum 14-hour driving window, which, when combined with the 10 hours off-duty provision, helps maintain a 24-hour clock (circadian cycle) and provides enough time for most drivers to obtain adequate sleep before returning to work.

Two studies that assess the length of driving time have been conducted since the 2003 rule went into effect.

One is an analysis of data from an on-road field test of a drowsy driver-monitoring device. The study monitored, among other things, driver

sleep quantity and the number of critical incidents (*e.g.*, crashes, near-crashes, and evasive actions) in which the driver became involved, and assessed driver fatigue and performance during critical incidents. Analysis of the study data, which were collected from May 2004 to May 2005, found that drivers included in the study were sleeping an average of 6.28 hours under the 2003 rule, which requires at least 10 hours off duty. For drivers who drove in both the 10th and 11th hour, no significant difference was found between the 10th and 11th hours of driving with respect to either alertness or involvement in critical events [Hanowski, R.J., *et al.* (2005), p. 9]. A similar but pre-2003 on-road study [Wylie, C.D., *et al.* (1996), p. ES–9] with 80 long-haul drivers who drove either 10 (U.S. rule) or 13 hours (Canadian rule) found that drivers were averaging 5.18 hours sleep per night. Both the Canadian and U.S. HOS rules that were in effect at the time required a minimum 8 hours off duty. Thus, comparing these two studies, drivers working under the 10-hour minimum off-duty rule are averaging over 1 hour more sleep per night. In the Wylie, *et al.* [Id.] study, there was no difference in the amount of drowsiness observed in video records (for comparable daytime segments) between the 10-hour and the 13-hour driving times. Self-rating of fatigue increased with driving duration even though there were no strong performance changes, leading the authors to conclude, ''Time on task was not a strong or consistent predictor of observed fatigue'' [Wylie, C.D., *et al.* (1996), page ES–9].

Another study under the pre-2003 rule, ''Trucks Involved in Fatal Accidents'' (TIFA) [Campbell, K.L. (2005)], found an increase in crash/fatality risk with increasing driving time. This study included only data on crashes that occurred from 1991 to 2002, prior to the 2003 HOS rule change. Additionally, among the 50,000 trucks involved in fatal crashes that occurred over the 12-year period, only nine crashes involving drivers who drove in the 11th hour of driving were fatigue-related. Note that these drivers were probably driving illegally, since the pre-2003 rule had a 10-hour driving limit.

A recent study [Jovanis, P.P., *et al.*, (2005)] used time-based logistic regression models to develop crash risk estimates by hours of driving. While all drivers drive during the first hour of the trip, relatively few drive through the 11th hour. Therefore, the sample sizes in the 11th hour of driving are typically so small that the resulting model has a large standard error, particularly at the upper limits of the driving time. As a result, the model's 95 percent confidence intervals in the crash risk estimates for the 11th hour of driving show that the crash risk could be significantly higher than driving in the first hour, or it could be just slightly elevated above the first hour of driving. The most likely cause for this inconclusive result is small sample size.[2]

Sleepiness, performance decrements and crash risk follow the circadian cycle, that is, they peak in the late afternoon at one of the circadian low points [Wylie, C.D., *et al.* (1996), pp. 1–3; Akerstedt, T. (1997), p. 106]. This fact emphasizes the value of moving toward a 24-hour work/rest day. The 14-hour maximum driving window, combined with the 10-consecutive-hour minimum off-duty time provided in today's rule, moves toward stabilizing the 24-hour clock by helping to avoid driver shift rotation, and providing enough time to obtain 7–8 hours of sleep for most drivers. Rotating shifts that advance or delay the starting time for each subsequent shift can cause drivers to become out of phase with their circadian rhythm, depending on the extent of the change in their starting time. The 14-hour driving window and 10-hour off-duty time provisions of this final rule provide an opportunity to maintain a 24-hour work/rest day that will allow drivers to maintain circadian rhythm. FMCSA analysis indicates that approximately 22 percent of CMV drivers drive during the early morning hours (midnight to 6 a.m.). These drivers will benefit from the 10-hour minimum off-duty provision in order to maximize their sleep time.

Longer daytime work hours combined with good quality and quantity of sleep (7–8 hours) per day do not appear to pose a safety or health problem to CMV drivers. In a driving simulator study, the schedule of 14 hours on duty/10 hours off duty for a 5-day week did not appear to produce significant cumulative fatigue over the three-week study period [O'Neill, T.R., *et al.* (1999), p. 2].

In Wylie, *et al.* [*Id.*] and other studies, the authors point out that many of the drivers showed signs of, or reported, fatigue early in the workweek after their ''weekend'' off-duty period [Morrow, P.C., & Crum, M.R. (2004), p. 14; Hanowski, R.J., *et al.* (2000), p.17; Wylie, C.D., *et al.* (1996), p. ES–9], implying that sleep habits on non-work days are likely a significant contributor to driver fatigue. FMCSA regulations can provide an opportunity for sleep, but drivers need to maintain responsible sleeping habits.

Lin and his colleagues formulated an elapsed time-dependent logistic regression model to assess the safety of motor carrier operations [Lin, T.D., *et al.* (1993), p. 2]. Using crash data, this model provides estimates of the probability of CMVs having a crash. The estimates indicate that increased driving time had the strongest direct effect on crash risk. All of the data for these estimates were obtained from a single-less-than-truckload motor carrier. This study has many of the same problems associated with the time-based logistic regression models mentioned earlier; *i.e.*, small sample size in the later hours of driving. The authors concluded that crash risks ''are particularly disturbing at 8th hour of driving. Unfortunately this is when mathematical structure of the model becomes less certain * * * it weakens our conviction to recommend reducing driver hours regulations'' [Lin, T.D., *et al.* (1993), p. 10]. Understanding the limitations of their models, these authors did not recommend reducing driving time. They did, however, recommend increasing the minimum off-duty time from 8 hours to 10 hours.

The research findings associated with driving time are conflicting. The research on the effects of fatigue in operational (on-road) and simulated/laboratory settings generally have found no statistically significant difference in driver drowsiness or performance between the 10th and 11th hours of driving. The research analyzing crash data by time of day are typically conducted with small sample sizes, particularly in the 10th and 11th hours of driving, and the driver samples are arguably not representative of the whole industry. These studies generally find increasing risk with longer driving hours. On-road/simulator studies, however, have found no increase in fatigue or critical incidents while driving as many as 11 or as many as 13 hours per day. The Agency regards the research on driving time as inconclusive. FMCSA is adopting an 11-hour driving limit for the reasons given in sections H and J.5. The data on off-duty time is less problematical. Drivers appear to be obtaining more sleep as a result of the 10-consecutive-hour off-duty provision in the 2003 rule. The Agency has therefore decided to adopt a 10-hour off-duty requirement for CMV drivers, coupled with a 14-hour driving window. This will move CMV drivers toward a more-stable 24-hour clock. Because there is a good deal of evidence that hours of continuous wakefulness

[2] Statistical estimates based on small sample sizes tend to have large sampling variations, meaning that detecting statistically significant differences between two estimates may not be possible.

are a better predictor of fatigue than driving time, a 14-hour non-extendable driving window will help to reduce driver fatigue, compared to the extendable 15-hour window included in the pre-2003 rule. See Sections H.6 and J.5 through J.7 for a more detailed discussion of the Agency's findings and decisions regarding driving, duty, and off-duty times.

F.4. Split Sleep

In the 2003 rule, drivers using trucks equipped with sleeper berths were allowed to split their 10-hour off-duty/sleep time into two periods of varying length as long as the shorter of the two periods was a minimum of two hours. This exception to the 10-consecutive-hours off-duty rule had, in many instances, resulted in drivers splitting their sleep into two periods. Drivers could, for example, divide their sleep over two 5-hour periods. The National Transportation Safety Board (NTSB) has been critical of the split sleep provision in the past, noting that, ''* * * sleep accumulated in short time blocks is less refreshing than sleep accumulated in one long time period'' [NTSB (1996), p. 46)].

Sleep becomes fragmented when drivers elect to take their sleep in two shorter periods, rather than one 7 to 8 hour period. Fragmented sleep has less recuperative value and has been shown to be similar to partial sleep deprivation in its effects on performance [Belenky, G., *et al.* (1994), p. 129]. Studies of truck crash fatalities indicate that split sleep taken by drivers has an adverse effect on CMV safety. In a study of heavy truck crashes and accidents, NTSB cited police accident reports that show decrements in performance occurring earlier for drivers using sleeper berths. NTSB also found that ''drivers using sleeper berths had a higher crash risk than drivers obtaining sleep in a bed.'' NTSB reported that ''split-shift sleeper berth use increases the risk of fatality more than two-fold;'' and ''[s]plit-sleep patterns are among the top three predictors of fatigue-related accidents'' [NTSB (1996), p. 46]. In summary, NTSB concluded that accumulating 8 hours of rest in two sleeper-berth shifts increases the risk of fatality to tractor-trailer drivers who are involved in crashes.

An earlier study by the Insurance Institute for Highway Safety (IIHS) examined the association between sleeper berth use in two periods and tractor-trailer driver fatalities [Hertz, R.P. (1988)]. The findings from this study were similar to those reported by the NTSB. The IIHS found that, ''* * * split-shift sleeper berth use (driving without an eight-hour consecutive rest period), increased the risk of fatality over twofold;'' and that, ''* * * split-shift sleeper berth use increased the risk of fatality in all analyses except those limited to urban crashes and local pick-up and delivery crashes'' [*Id.*, p. 7]. The results of this analysis also found that accumulating 8 hours of rest over two sleeper berth periods increases the risk of fatality to tractor-trailer drivers who are involved in crashes. IIHS further concludes ''[t]he fact that risk remained the same regardless of team status suggests that increased risk of fatality is associated with nonconsecutive sleep rather than disturbance from the motion of the truck while sleeping'' [*Id.*, p. 11].

Today's rule is based on the research cited and addresses the concerns about driver fatigue resulting from sleep fragmentation by requiring a consecutive 8-hour sleeper berth period to allow drivers to obtain one primary period of sleep and a second 2-hour off-duty or sleeper berth period to be used at the driver's discretion for breaks, naps, meals, and other personal matters. The new sleeper berth provision is fully described in Section J.9 of this preamble.

F.5. Recovery

Sleep restriction over several days leads to a degradation in alertness and driving performance. When sleep is restricted by extended duty periods or night work, cumulative fatigue occurs and an extended off-duty period is needed to recover. Past studies have indicated that a large percentage of drivers (commercial and noncommercial) get less than the commonly recommended 7 to 8 hours sleep per day. [Dinges, D.F., *et al.* (2005), p. 38; Balkin, T., *et al.* (2000), p. 4–48; Mitler, M.M., *et al.* (1997), p. 755; Wylie, C.D., *et al.* (1996), p. ES–10]. Many drivers who obtain less than their daily requirement of sleep over time incur a sleep debt; the resulting cumulative fatigue leads to an increased crash risk [Hanowski, R.J., *et al.* (2000), pp. 11–12]. Recovery time is required to restore the mind and body to normal function and health, as well as to erase the deleterious effects that sleep loss has on alertness and performance.

The TRB fatigue team found five studies that provided information regarding the recovery time needed for CMV drivers after working a long week. Four of these studies provide support for recovery periods of 34 hours or less while only one of these studies supports a recovery period longer than 34 hours.

Two studies suggest that a single 24-hour period is sufficient time for a driver to recover from any cumulative fatigue. Alluisi's research [Alluisi, E.A. (1972), p. 199] involved subjects who worked 8 hours a day for 3 days, followed by a 4 hours on/4 hours off schedule (similar to driving with a sleeper berth) over a 2-day period. He found that the average performance of drivers dropped to 67 percent of baseline toward the end of this period. A 24-hour rest period was sufficient to permit recovery back to baseline. A simulator study examined daytime driving of 14 hours on/10 hours off over a 15-day period [O'Neill, T.R., *et al.* (1999), p. 36]. These authors found that 24 hours was an adequate amount of time for recovery. A third study [Feyer, A.M., *et al.* (1997), p. 541] found a dramatic recovery with respect to fatigue in team drivers who stopped overnight in the middle of a 4 to 5 day trip. Thus, with less than 24 hours off, a single night of sleep was very helpful for recovery. A fourth study [Balkin, T., *et al.* (2000), p. 1–2] found that whether or not 24 hours was sufficient depended on the sensitivity of the performance measure used to assess recovery. Subjects who carried out performance tasks during the day and were restricted to 3, 5, or 7 hours in bed at night were fully recovered after 1 day of recovery sleep of 8 hours in bed, if the performance measure was lane tracking or simulator driving crashes. If the measure was performance on the psychomotor vigilance test (PVT), a more sensitive test of fatigue, then recovery required more than 24 hours. The group who had 9 hours in bed during the work period, but were then restricted to 8 hours in bed during the recovery period, did not perform well on lane-tracking as well as during the work period, clearly illustrating how sensitive and essential one's performance is to even one additional hour of sleep.

The TRB driver fatigue team found two recovery studies that were conducted with CMV drivers in a field environment. The Wylie [Wylie, C.D., *et al.* (1997)] study was a small demonstration study of a methodology that could be used to evaluate drivers' recovery periods. Twenty-five drivers were assigned into small groups (four to five drivers) and were used to evaluate different recovery (12-, 36-, and 48-hour) periods and driving time. None of the recovery periods examined were found to be of sufficient length for driver recovery. However, the study concluded that the small subject sample limited the ability to make reliable estimates of observed effects [Wylie, C.D., *et al.* (1997), p. 27].

The methodology and sample size nullifies Wylie study findings, and the

Agency has not relied on this study in determining the appropriate recovery period for CMV drivers. Balkin [Balkin, T., *et al.* (2000), p. 5–1] as discussed in the previous section, found that after 7 days of daytime work, when sleep had been restricted to 5 or 7 hours in bed, a recovery period of more than 24 hours was required to return to baseline levels of the most sensitive performance task. For extreme sleep restriction of 3 hours in bed, 72 hours recovery was insufficient to bring performance of the PVT task back to baseline.

While the research on driver recovery appears limited to five studies that particularly focus on CMV driver recovery, two simulator studies suggest that 24 hours is sufficient for recovery after 70 hours of daytime driving [O'Neill, T.R., *et al.* (1999), p. 2; Alluisi, E.A. (1972), p. 199]. One on-the-road study found that drivers achieve adequate recovery after 24 hours off duty. Another on-road study suggests that 36 hours is not quite sufficient with regard to PVT measures, but is adequate for driving parameters, including lane-tracking performance during daytime driving.

In balance, most of the research with CMV drivers supports the assessment that a recovery period of 34 consecutive hours is sufficient for recovery from moderate cumulative fatigue. The importance of two night (10 p.m.–6 a.m.) recovery periods was highlighted by the 1998 HOS expert panel report [Belenky, G., *et al.* (1998), p. 13]. The majority of drivers (approximately 80 percent) are daytime drivers, and would likely start their recovery period between 6 p.m. and midnight. All of these drivers would have the opportunity for two full nights prior to the start of the next work week. For a more detailed discussion regarding the recovery period provision of this rule, see Section J.8 of this preamble.

F.6. Short-Haul

Motor carrier operations that are conducted solely within a 150 air-mile radius from their terminals and require drivers to return to their work-reporting location every night are generally considered short-haul operations. A review of the research literature revealed only a few studies on short-haul operations. The first study reviewed was the Massie study [Massie, D.L., *et al.* (1997)] which found that short-haul drivers have significantly fewer fatigue related crashes as compared to drivers for longer trips (0.4 percent for short-haul trucks compared to 3.0 percent for other trucks). Another important finding was that ''class 7–8 trucks [26,001 pounds gross vehicle weight rating (GVWR) and up] have a fatigue-related fatal involvement rate 8 times higher than class 3–6 trucks [10,001–26,000 pounds GVWR]; over-the-road trucks have a rate 18 times higher than local service trucks; and the rate for tractors exceeds the rate for single-unit straight trucks by a factor of 11'' [Massie, D.L., *et al.* (1997), p. 35].

A second study evaluated the stress that short-haul drivers face daily. Researchers that administered a cross-sectional questionnaire to 317 CMV drivers found that short-haul drivers have significantly higher stress-related symptoms than the general adult population [Orris, P., *et al.* (1997), p. 208]. These drivers perceived their daily events to be more stressful than the norm because of heavy workloads and inflexible schedules.

Hanowski, *et al.* (1998; 2000) conducted two studies on short-haul drivers—a focus group and a field study. The first study provided a better definition of what constituted a short-haul driver and the varied tasks and demands they encounter [Hanowski, R.J., *et al.* (1998), p. 1]. The focus groups concluded that driving was not their primary task, accounting for about 40 percent (less than 5 hours) of their work time, scattered throughout the day. The two safety problems most often mentioned by short-haul drivers were dealing with poor driving by operators of cars, pickups, SUVs, etc., and ''stress due to time pressure.'' Additionally, Hanowski, *et al.* [Hanowski, R.J., *et al.* (2000), pp. 1–162] conducted a field study of short-haul drivers with instrumented vehicles to gain a better understanding of critical incidents that occur within short-haul operations. A critical incident was defined as a near crash event, *i.e.*, an event that without evasive action by the driver would likely have resulted in a crash. Of the 249 critical incidents found in the study, 137 were attributed to ''other'' (*i.e.*, non-CMV) drivers, 77 to the short-haul drivers, and 35 were attributed to incidents outside the control of the driver, such as an animal in the road. Fatigue played a role in only 6 percent of those incidents, and no fatigue crashes were reported [*Id.*].

In determining whether to allow short-haul drivers additional time to complete their deliveries, the Agency relied on both laboratory and field research studies which confirm the ability of drivers to work a 16-hour shift without significant degradation of performance. A laboratory study of 48 healthy adults found the critical wake period beyond which performance began to lapse was statistically estimated to be about 16 hours [Van Dongen, H.P.A., *et al.* (2003), p. 125]. A study of New Zealand drivers found that drivers could maintain their performance until about the 17th hour of wakefulness; beyond the 17th hour, performance capacity was sufficiently impaired to be of concern for safety [Williamson, A.M., *et al.* (2000), p. 3].

Some short-haul drivers do accrue fatigue, however, and in a field study of CMV drivers, it was found that short-haul drivers take short naps of 1- to 2-hours duration in order to reduce any fatigue accrued during the course of a normal work day. This study showed that these drivers take naps within the work shift while they are waiting for their vehicle to be loaded or unloaded or during normal breaks for meals [Balkin, T., *et al.* (2000), p. 4–63]. Short-haul drivers are unique in that they do not drive for long periods of time. As mentioned, Hanowski [Hanowski, R.J., *et al.* (2000), p. 17] found that only 40 percent of their time is actually spent driving, and that time was scattered throughout the day. Therefore, traditional performance models (time-on-task) do not apply because periods of driving are interrupted during their work day. Based on this evidence, FMCSA has concluded that because of the uniqueness of short-haul operations, and because short-haul drivers are involved in fewer crashes than long-haul drivers, they will be able to maintain alertness and vigilance for an additional 2 hours for 2 days per week.

The short-haul provision in this final rule takes into account the available research on short-haul drivers and addresses one of the key problems confronted by short-haul drivers—the stress of tight schedules. To set the context, the research discussed in Section F, ''Driver Fatigue,'' and elsewhere in this preamble suggests that driver fatigue is much less of an issue with short-haul drivers than with long-haul truckers, primarily because they return home nightly. Many also have fixed work schedules. Short-haul drivers typically operate during the daytime hours and are able to sleep at night, which is generally preferable to sleeping during the day. Short-haul drivers do not drive for long periods each day, either cumulatively or in a single session, and driving is usually followed by the physical activity of unloading throughout the day, which improves alertness. Short-haul drivers are less likely to fall asleep at the wheel due to driving monotony. In addition, short-haul driving generally occurs in urban settings requiring high levels of alertness, but also providing more stimuli to drivers. Short-haul crashes, when they happen, are more likely to

involve property damage than severe injuries or fatalities. Because the short-haul regime adopted by this final rule increases the work window available to short-haul drivers, it should relieve them, at little risk to CMV safety, from the stress and need to hurry caused by inflexible schedules and limited work hours. The new regulatory regime for short-haul drivers is described in more detail in Section J.10.

G. Current and Future FMCSA Research

In the 2005 NPRM, the Agency requested information on hours-of-service research issues, including data gaps and processes, and methodologies to facilitate data collection and analysis [70 FR 3350]. The Agency received no specific responses to this request. However, FMCSA continues to proactively research health and safety issues relevant to HOS.

The FMCSA Research and Technology (R&T) 5-Year Strategic Plan outlines a vision for delivering an appropriately targeted research and technology program that will assist in fulfilling FMCSA's primary mission to reduce crashes, injuries and fatalities involving large trucks and motorcoaches. One of the challenges identified in the R&T 5-Year Strategic Plan is to curtail driver fatigue and lack of alertness. Fatigue and the lack of alertness are factors in CMV crashes, but more research is needed to better understand the causes of fatigue and methods of improving alertness. Hours-of-service rules and driver-oriented programs will need to be continually evaluated and improved. R&T will investigate, by means of simulator and field studies, the factors affecting fatigue and the recovery times. Other initiatives identified in the R&T 5-Year Strategic Plan will also result in the research and evaluation of driver health issues. Moreover, in an effort to address the complex HOS health issues confronting CMV drivers, FMCSA anticipates working with NIOSH on areas of mutual concern and interest.

FMCSA is identifying, through the use of surveys, the best practices employed by experienced CMV drivers to manage their fatigue. This study will be published later this year. In addition, FMCSA has the following fatigue-related studies that are under way in 2005 and will continue for the next several years.

This research and survey of best practices may contribute to educational initiatives, to technological aids, to the rulemaking process on EOBRs, and to other aspects of CMV operation and regulation.

G.1. Fatigue Management Program

The FMCSA Fatigue Management Program (FMP), under development in partnership with Transport Canada, provides managers and drivers with a framework for managing driver fatigue through, among other items, awareness and education on screening for sleep disorders, biocompatible scheduling practices, and an understanding of the need and implications of good sleep habits. The program has been developed, pilot tested in the U.S. and Canada, and is currently in an evaluation phase where its cost and safety effectiveness will be assessed in an operational environment. Pending a positive result from the evaluation, the FMP materials will be revised and finalized, implementation guidelines will be developed, and comprehensive program materials and guidelines will be made available to motor carriers and individuals who wish to implement them.

G.2. Shift Changes and Driver Fatigue Recovery

The FMCSA Shift Changes and Driver Fatigue Recovery Study currently under way has two primary goals:

- Investigate and make recommendations regarding the minimum duration of off-duty periods required for CMV drivers to recover from the effects of cumulative fatigue resulting from various work shift conditions.
- Complete a study and publish a report with conclusions and recommendations from the Shift Changes and Driver Fatigue Recovery Study.

Hours-of-service initiatives in both the United States and Canada have highlighted scheduling issues closely related to shift changes, in particular, the issue of ''weekend'' recovery from cumulative fatigue. Although CMV drivers may take their ''weekends'' on any day of the week, the issue of concern is the recovery process that occurs during these days off. If some degree of sleep deprivation occurs during the workweek for drivers (especially when that week has involved night driving and/or shift changes), it is critical that drivers have sufficient time off during their ''weekend'' to recover full alertness and physical vitality. This continuing research is focusing on the recovery process in the context of various schedules including day driving, night driving, and rotating shifts. After conducting a review of the relevant literature (Phase I), a research plan was developed that includes recommended hypotheses to be examined and empirical research methodologies to be employed (Phase II). In 2005, a contract was awarded to conduct the empirical studies (Phase III). A final report stating study conclusions and recommendations (Phase IV) will be completed by the end of 2007.

G.3. Advanced Driver Fatigue Alerting Technology

The objective of FMCSA's Advanced Driver Fatigue Alerting Technology research initiative is to increase driver alertness through a fatigue-alertness monitor. This will be done by establishing a low cost, reliable, comfortable, rugged, and user-friendly driver fatigue and alertness technology. Driver fatigue-alerting technology is intended to monitor driver drowsiness, provide continual alertness level feedback to the driver, and provide alerts and warnings when the driver's alertness level falls below a specified threshold.

Currently, FMCSA in partnership with NHTSA is conducting a proof-of-concept test of a drowsy-driver detection system based on the PERCLOS (percent of time the eyelids are closed 80% or more over a given time period) concept. PERCLOS has been demonstrated to be the most valid measure of driver fatigue. The current infrared-based technology to measure PERCLOS appears to work well at night, but has the limitation of not working in daylight, limiting the system's utility to night driving. FMCSA plans to explore new technologies and combinations of technologies or measures, such as steering, lane tracking, etc. that may overcome these limitations, and investigate development of a more robust system. The objective is to identify and develop a relatively low-cost device to be used primarily to reinforce driver fatigue training and promote behavioral change to assure drivers are well rested.

G.4. Effects of Vehicle Ergonomics on Driver Fatigue

The FMCSA Effects of Vehicle Ergonomics on Driver Fatigue initiative plans to identify design alternatives to assess the effects of vehicle ergonomics on driver fatigue. There have been many human factor studies designed to determine the effects associated with driving a CMV. However, there are no current studies to determine the effects of ergonomics on driver fatigue and CMV safety. Therefore, it is difficult for FMCSA to provide guidance or support to ergonomic-related rules that could improve safety. This study will review the project objective, conceive design

alternatives, examine methods, evaluate feasibility, and develop a final design incorporating a pilot study capable of demonstrating the approach's viability.

H. Crash Data

FMCSA compiled and reviewed recent large truck crash data throughout the industry to assess the impacts of the 2003 rule on crash rates, and to determine if there are ways to improve the 2003 rule to better address fatigue and fatigue-related crashes. This review consisted of examining the following studies and data sources: (1) Trucks Involved in Fatal Accidents (TIFA), (2) Virginia Tech Transportation Institute (VTTI) (preliminary), (3) Penn State University (preliminary), (4) data submitted in comments to the NPRM, and (5) Fatality Analysis Reporting System (FARS).

H.1. Trucks Involved in Fatal Accidents (TIFA) Data

The Trucks Involved in Fatal Accidents (TIFA) file combines data from the FARS with additional data on the truck and carrier collected by the University of Michigan Transportation Research Institute (UMTRI) in a telephone survey with the truck driver, carrier, or investigating officer after the fatal crash. TIFA records six variables: fatigue, time of day, power unit type, carrier type, intended trip distance, and hours driving since the last 8-hour off-duty period.

The report used by the Agency [Campbell, K.L. (2005)] reviewed TIFA data for the years 1991 through 2002 (the most recent year available). The sample size of this file represents over 50,000 medium/heavy trucks involved in fatal crashes in the U.S., roughly 1,000 of which were fatigue related. The objective of this report was to identify the operating conditions where the most fatigue-related crashes occur and to determine the association of fatigue risk factors with fatal crashes.

Over the period reviewed, the report found a gradual decline in the percent of trucks involved in all fatal crashes where truck driver fatigue was present at the time of the crash, with fluctuations around the downward trend. Campbell also noted that ''[b]oth prevalence and risk point to long-haul tractor drivers as the appropriate focus of efforts to reduce the incidence of fatigue.''

When examining the prevalence of fatigue-related fatal crashes by the number of hours driven at the time of the crash, the data reveal that the majority of such crashes occur in the early hours of the trip. This is largely attributable to exposure, since each trip necessarily begins with the first hour, which must be the most frequently driven. However, when examining the relative risk of a fatigue-related crash by hours of driving, or the number of trucks involved in fatigue-related fatal crashes in a given driving hour as a percent of all large trucks involved in fatal crashes in the same hour, the results trend differently. The likelihood a truck driver was fatigued at the time of a fatal crash generally increases with the number of hours driven. TIFA data show that the relative risk of a large truck being involved in a fatigue-related crash in the 11th hour of driving or later is notably higher than in the 10th hour of driving.

Despite its scope and complexity, however, TIFA data must be treated with caution. The number of fatigue-related crashes that occurred in the 11th hour of driving or later is extremely small. Of the roughly 1,000 trucks involved in fatigue-related fatal crashes between 1991 and 2002, only nine were operating in the 11th hour of driving time.

The HOS rule in effect when the TIFA data were collected allowed only 10 hours of driving, required a minimum off-duty period of only 8 hours, and allowed driving within a 15-hour window that could be extended by the amount of off-duty time taken during that period. The 2003 rule, which allows up to 11 hours of daily driving but requires 10 hours off duty, may have reduced the risk of driver fatigue and thus the percent of large truck fatal crashes involving fatigue. The applicability of TIFA data under the regulatory environment created by the 2003 rule is no longer clear.

FARS, the source of the crash data for the TIFA study, does not contain information on driving hours at the time of the crash. TIFA researchers therefore contact the driver (or the employing carrier) after the fatal crash to collect such information. However, a good deal of time can elapse (more than a year in some cases) between the date of the crash and the date the TIFA researcher first contacts the driver (or the employing carrier). This delay raises the question whether the driver can accurately recall his/her driving time so long after the incident.

H.2. Virginia Tech Transportation Institute Study

FMCSA contracted with the Virginia Tech Transportation Institute (VTTI) to collect and analyze data on crash risk during the 10th and 11th hour of driving as part of an on-the-road driving study VTTI was conducting under an FMCSA/NHTSA joint initiative. This study offered an opportunity to analyze empirical, real-world data obtained under the 2003 HOS rule. The primary goal was to determine the effect of the 11th hour of driving on driver performance and drowsiness.

Data collection for the study, ''A Field Operational Test of a Drowsy Driver Warning System,'' began in May 2004. All data collected through May 1, 2005 were used in this analysis. The researchers have found no statistically significant difference in the number of ''critical'' incidents in the 10th and 11th hours of driving [Hanowski, R. J., *et al.* (2005), p. 9]. The study defines critical incidents as crashes, near crashes (where a rapid evasive maneuver is needed to avoid a crash) and crash-relevant conflicts (which require a crash-avoidance maneuver less severe than a near-crash, but more severe than normal driving). When the occurrence of critical incidents is used as a surrogate for driver performance decrements, there is no statistical difference between the 10th and 11th hour of driving. The study has also determined that drivers are not measurably drowsier in the 11th than the 10th hour of driving. These results may be related to another finding, that drivers appear to be getting more sleep under the 2003 rules than they did when the minimum off-duty period was only 8 hours. Compared to four sleep studies conducted under the pre-2003 rules (see section E.1), the Hanowski study found that drivers operating under the 2003 rule are obtaining over 1 hour of additional sleep per day [*Id.*, p. 8]

It should be noted, however, that the study is not yet complete. The study involves 82 drivers working for three trucking companies who had driven a total of 1.69 million miles as of May 1, 2005, under the 2003 HOS rule. A copy of this VTTI analysis is in the docket.

H.3. Crash Risk and Hours Driving: Interim Report II

In January 2003, the Pennsylvania Transportation Institute at Pennsylvania State University began work for FMCSA to model the effects of various commercial driving operational measures (hours driving, hours of rest, multi-day driving patterns) on crashes [Jovanis, P.P., *et al.* (2005)]. This study collected records of duty status (RODS) for 7-day periods prior to crashes, as well as for a non-crash control group. The RODS were collected between January 2004 and December 2004. Through time-dependent logistic regression modeling, the study found a pattern of increased crash risk associated with hours of driving,

particularly in the 9th, 10th and 11th hours, and multi-day driving. The study also suggests a higher crash risk associated with sleeper-berth operations. For all operations, the study found that the 11th hour of driving has a crash risk of more than three times that of the first hour.

Like the VTTI study, this study is incomplete. All RODS were collected from 3 for-hire motor carriers. The researchers obtained RODS for 231 7-day periods with one or more crashes and 462 7-day control periods with no crashes. Driving in the 11th hour occurred only 34 times.

H.4. Comments on Crash Risk and Data

Many companies and associations submitted data on crash and injury rates. Figure 4 shows changes in DOT recordable accidents, preventable accidents, and injuries under the 2003 rule, as reported in several comments. In general, the data show that crash and injury rates were lower in the year since the 2003 rule went into effect in January 2004.

FIGURE 4.—CHANGES IN ACCIDENT AND INJURY RATES FROM 2003 TO 2004

[Per million miles]

Commenter	Fleet size	Crash or injury type	2003	2004	Percent change
Maverick Transportation	1100 power units	DOT recordable accidents	0.63	0.60	·4.8
		Preventable accidents	0.32	0.24	·25
		Crash-related injuries			·30
Roehl Transport	1600 power units	DOT accidents involving injuries	0.08765	0.06554	·25
ABF Freight System	1635 road tractors	Over-the-road accidents	*1.49	1.42	·4.6
		Preventable road accidents	*0.715	0.586	·15
		Injuries for over-the-road drivers			·41
CR England	2550 power units	Collision-related injuries			·1.9
Overnite Transportation	6000 power units	DOT recordable accidents	0.84	0.80	·4.8
		DOT preventable accidents	0.31	0.31	0
		Collision-related injuries			·8.6
Werner Enterprises	8700 tractors	DOT recordable accidents	0.6898	0.7092	+2.8
		Chargeable accidents	0.3311	0.3238	·2.2
J.B. Hunt	11,000 tractors	DOT recordable accidents			·10
		DOT preventable accidents			·16
		Driver injuries as a result of motor vehicle accidents.			·19
Schneider National	13,340 tractors	Preventable major (over $100,000 in cost accidents.			·36
		Fatigue-related major accidents			·50
		Worker's compensation claims from vehicle accidents.			·10
ATA survey	77,000 to 79,000 trucks	DOT recordable accidents	0.60	0.57	·5.0
		DOT preventable accidents	0.24	0.24	0
		Injuries	0.81	0.75	·7.4
FedEx	71,000 motorized vehicles.	At FedEx Express, fatigue-related accidents.			·3.8
		At FedEx Ground, DOT recordable accident rate.			·9
		At FedEx Freight, driver injury rate			·4
National Private Truck Council.	63 questionnaires	DOT recordable accidents	0.4921	0.4248	·13.7
Minnesota Trucking Association survey.	85 questionnaires (61% long-haul carriers).	Preventable/recordable crashes			61% of members reported no change. 33% reported a decrease.

*Five-year average. Blank cells indicate data not reported.

In addition to the information provided in Figure 4, eighteen other companies and associations reported a decrease in crash rates, but did not provide data to support their claims, and 8 others found little change in crash rates between 2003 and 2004. The Commercial Vehicle Safety Alliance (CVSA) cautioned that additional data over a longer period of time are needed to determine to what extent the 2003 rule has impacted large truck safety.

ATA reported data showing that carriers had statistically significant lower average crash rates in 2004, causing ATA to believe that the 2003 rule is superior to the pre-2003 rule from the perspective of overall safety. Two State government agencies, however, pointed out that the FMCSA Motor Carrier Management Information System (MCMIS) data show an increase in CMV crashes. FMCSA considered the use of MCMIS data to examine changes in truck-related crashes between 2003 and 2004. However, the Agency decided to utilize FARS data for this analysis (see below), in lieu of available MCMIS data, for two reasons. First, the MCMIS crash data do not provide researchers the ability to isolate fatigue-related crashes, which are critical for this rulemaking. FARS data do provide this ability. Second, FMCSA crash data experts believe that, for a variety of reasons, MCMIS currently fails to capture roughly 20 percent of the fatal crashes that are reported in FARS. Because of these MCMIS limitations, FMCSA chose to use FARS data for its analysis.

The information provided by commenters is not available from any other source, but there is undoubtedly some variability in the methods and accuracy with which the data were collected. Equally important, the crash and injury reductions reported by

commenters cannot be definitively attributed to the effects of the 2003 rule, though some commenters noted that the rule is the only major variable that changed from 2003 to 2004.

H.5. Fatality Analysis Reporting System (FARS)

FARS is a national census of fatal crashes involving motor vehicles, including large trucks. FARS data are reported annually by the States, maintained by NHTSA, and are generally recognized as the most reliable national motor vehicle crash data available.

FMCSA began by analyzing the 2003 FARS Annual Report File. Because the 2004 Annual Report File had not yet been released at the time the analysis for this rulemaking was conducted, FMCSA examined its predecessor, the ''Early Assessment File,'' which typically contains most of the fatal crashes that eventually appear in both the Annual Report and Final FARS data sets. For example, a NHTSA comparison of calendar years 2002 and 2003 indicates that the Early Assessment File captured at least 75 percent of the total crashes and fatalities later included in the Annual Report Files for those years. Since the earlier months of the calendar year are reported more completely in the Early Assessment File, FMCSA restricted its analysis to the first 9 months of 2003 and 2004.

FMCSA examined all fatal crashes involving large trucks from January through September of 2003 and 2004, as well as those where the truck driver was coded as fatigued at the time of the crash. Results from this year-to-year comparison are presented in Figure 5.

FIGURE 5.—FATAL CRASHES INVOLVING LARGE TRUCKS

[Calendar years 2003 and 2004 (first 9 months of each year)]

Calendar year	Total crashes	Number	Fatigue-related (truck driver) crashes
			Percent
2003	3,120	54	1.7
2004	2,954	43	1.5
Year-to-Year Difference (Number)	·166	·11	·0.2
Year to-Year % Difference	·5.3	·20.4	·11.8

Source(s): 2003 Fatality Analysis Reporting System (FARS) Annual File; 2004 FARS Early Assessment File, National Highway Traffic Safety Administration.

Figure 5 shows that the total number of fatal crashes involving large trucks decreased by 166, from 3,120 in 2003 to 2,954 in 2004. This represents a 5.3 percent reduction. The number of large truck crashes where the driver was coded as fatigued dropped by 11 crashes, or 20.4 percent. More importantly, however, fatigue-related fatal crashes are down from 1.7 percent of all crashes in 2003 to 1.5 percent in 2004, an 11.8 percent reduction.

These reductions in fatigue-related fatal crashes are very small, and are not enough to allow final conclusions about the long-term impact of the 2003 rule on highway safety. However, the available information may suggest that fatigue-related crashes overall are trending in the right direction.

H.6. Conclusion

Available information on the effect of allowing 11 hours of driving time is inconclusive. TIFA is a large data set based on crashes that occurred across the nation over a relatively extended period. While the statistical risk increases rather sharply in the 11th hour of driving, in all the years from 1991 to 2002 TIFA classified only 9 fatal crashes that occurred in the 11th hour of driving as fatigue-related. Furthermore, TIFA data were collected at a time when Federal HOS regulations required only 8 hours off duty, and allowed driving within an extendable 15-hour window, both of which may have ensured that drivers operating in the 11th hour were more fatigued than would be the case under the 2003 rule. Finally, the pre-2003 rule allowed only 10 hours of driving, which means that drivers operating in the 11th hour were out of compliance with the rules at the time, and therefore may not be representative of drivers legally operating in the 11th hour after adoption of the 2003 rule.

The on-going studies by the Virginia Tech Transportation Institute and the Pennsylvania Transportation Institute are being conducted under the 2003 HOS rule and therefore avoid one of the problems associated with TIFA data. One finds that the 11th hour of driving poses an increased crash risk while the other finds no statistical difference between the 10th and 11th hours of driving. Because of the relatively short time since the 2003 rule was adopted, both studies acknowledge a considerable amount of uncertainty which may be resolved once the datasets increase.

Nearly all of the motor carriers and trucking organizations that submitted comments to the docket reported lower crash and injury rates in 2004, when the 2003 HOS rule was first enforced, than in 2003. This downward trend reveals nothing specific to the 11th hour of driving time, nor can it be attributed directly to the 2003 rule, but it does suggest that the net effect of the various provisions of the 2003 rule has not been harmful. However, the data summarized in Figure 4 were undoubtedly collected and reported with differing degrees of statistical sophistication. Still, the number of drivers employed by the carriers that provided information is very large and the downward trend in accidents and injuries is unmistakable.

Preliminary FARS data show that there were fewer fatigue-related fatal CMV crashes in the first nine months of 2004, when drivers and carriers were subject to the 2003 rule, than in the same months of 2003, when they were subject to the previous rule. Fatigue-related fatal crashes as a percentage of all CMV fatal crashes were also down in 2004. This result is similar to the information provided in motor carrier comments to the NPRM. The downward trend is clear, but the data do not allow a calculation of crash risk for each additional hour of driving.

In short, the available crash data do not clearly indicate whether the 11th hour of driving, combined with the other provisions of the 2003 rule, poses a significant risk. Because the data are not clear, for the purposes of this rulemaking's RIA, FMCSA conservatively assumed that the increased fatigue crash risk of driving in the 11th hour could be explained by the TIFA data as summarized in Campbell 2005, and FMCSA tests the robustness of the conclusions of this analysis

through a sensitivity analysis that assumes an even higher relative fatigue crash risk of driving in the 11th hour.

FMCSA carried out a cost/benefit analysis of a 10- and 11-hour driving limit and other aspects of this final rule. The results are described fully in section K.1 and in the Regulatory Impact Analysis (RIA) filed separately in the docket. Motor carrier operations were modeled very elaborately. As discussed above, the Agency used a time-on-task multiplier based on the TIFA data. The model assumed that the risk of the 11th versus the 10th hour of driving increased, as based on the TIFA data. FMCSA estimated that a 10-hour driving limit would save no more than 9.3 lives per year compared to an 11-hour limit, but at an annualized net cost of $526 million ($586 million in gross costs minus $60 million in safety benefits), relative to an 11-hour limit. In other words, a 10-hour driving limit would cost more than $63 million per life saved.

FMCSA conducted a number of sensitivity analyses regarding the relationship between fatigue-related crash risk and driving in the 11th hour to test the sensitivity of the RIA results to the assumptions built into the model. The sensitivity analyses are contained in Chapter 6, Section 8, of the RIA.

While the Agency did not explicitly estimate the marginal costs and benefits of limiting daily driving to 8 or 9 hours, FMCSA believes that such a change would not be any more cost beneficial than a 10-hour limit. This is due to the fact that, while the increase in the relative risk of a fatigue-related crash generally rises after the 8th hour of driving (according to the TIFA data), the increase is more notable in the 10th hour and later. Therefore, since the Agency's economic evaluation shows that a 10-hour driving limit results in considerably higher costs than benefits, compared to an 11-hour limit (holding all other HOS regulations constant), it logically follows that limiting driving time to 8 or 9 hours would yield the same result. Additionally, limiting daily driving to 8 hours, for instance, could increase the impact of a backward rotating schedule for some drivers (8 hours of driving + 10 hours off duty = 18 hours) relative to the 2003 rule (11 hours of driving + 10 hours off duty = 21 hours). Such a change has the potential to increase fatigue-related crash risks due to the disruption of driver circadian rhythms.

Although FMCSA's mission is improved CMV and highway safety, the Agency is required by statute to consider the costs and benefits of requirements it may impose [49 U.S.C. 31136(c)(2)(A) and 31502(d)]. Such consideration is clearly expected to influence the Agency's rulemaking decisions. The Department of Transportation currently uses $3 million as the ''value of a statistical life'' (VSL) for rulemaking purposes. A 10-hour driving limit would essentially have a VSL more than 21 times the current DOT standard. This cost per life saved is substantially higher than the maximum $10 million per statistical life cited by the Office of Management and Budget (OMB) in its guidance to Federal agencies on conducting regulatory impact analyses [OMB Circular A–4, p. 30]. Setting the maximum driving time at 10 hours would impose upon the motor carrier industry, an important sector of the American economy, regulatory costs entirely disproportionate to regulatory benefits. Most of the studies and analyses that report an increased crash risk in the 11th hour of driving are based on data collected while the driving limit was 10 hours and the minimum off-duty period 8 hours. The agency expected the new 10-hour off-duty period required by the 2003 rule to reduce driver fatigue and improve safety, despite allowing 11 hours of driving time instead of 10 hours. Comprehensive data to test that assumption are not yet available, but many motor carriers have reported lower crash and injury rates under the 2003 rule, and preliminary FARS data indicates that fatigue-related fatal truck crashes have declined, both in number and as a percentage of all fatal CMV crashes. This suggests that the pre-2003 studies and data connecting the 11th hour of driving with a higher crash risk may no longer be relevant because the 2003 rule has created better opportunities for restorative sleep, opportunities which drivers have used to good effect. In short, it is FMCSA's best judgment that the $526 million net cost of a 10-hour driving limit is too high to justify the modest benefits it would generate. This factor, coupled with the inconclusive nature of available crash data, has led the Agency to set the maximum allowable driving time at 11 hours after 10 consecutive hours off duty.

I. Operational Data

To better understand how the motor carrier industry has implemented the 2003 HOS rule and to help assess the safety and cost impacts, FMCSA compiled and reviewed several data sets on industry's current use of the 34-hour recovery provision, the 11th hour of driving, the 14-hour tour of duty, and split sleeper berth. Additionally, the Agency examined average weekly hours worked after implementation of the 2003 rule, as well as average nightly sleep. Data compiled or reviewed to answer these questions included that obtained from the 2005 FMCSA Field Survey, the 2004 Owner-Operator Independent Drivers Association (OOIDA) survey, the 2004 Stephen Burks Private Carrier Survey, Schneider National, Inc. (a large, for-hire truckload carrier), and the Virginia Tech Transportation Institute study.

I.1. 2005 FMCSA Field Survey

In January 2005, FMCSA initiated a survey by its field staff to assess the motor carrier industry's implementation and use of the 2003 rule. The data collected were based upon the driver records of duty status, or time records, as applicable, and included the months of July 2004 through January 2005. The survey results are based upon the collection of data from a cross-section of industry in 44 States, and represent a sizeable population of commercial drivers and on-duty periods in calendar years 2004 and 2005.

The project was conducted in conjunction with normal motor carrier review activities during the period of January 24, 2005 to February 4, 2005. While the survey was conducted, all compliance and enforcement decisions and actions followed established Agency procedures. To enhance the quality of the data collected, the Agency excluded drivers that were found to have falsified their records.

Overall, 269 motor carriers were surveyed, with 542 driver records examined. The majority of the survey (81 percent) was completed in conjunction with a compliance review; with the remaining (19 percent) in conjunction with a safety audit. A compliance review is an in-depth review of a motor carrier's compliance with the Federal Motor Carrier Safety Regulations (49 CFR parts 382 to 399) and Hazardous Materials Regulations (49 CFR parts 100 to 180), as applicable. Motor carriers are selected for review based upon safety performance or receipt of a non-frivolous complaint, or in follow-up to previous compliance/enforcement actions. A safety audit, on the other hand, is a review of the carrier's safety-management practices and controls, and is conducted within the first 18 months of the motor carrier beginning interstate operations. The safety audit is used to both educate the carrier and gather data to evaluate and determine whether the carrier has in place basic safety management controls to ensure safe operation of CMVs.

Of the carriers surveyed, 85 percent were classified as for-hire motor

carriers. Of the drivers surveyed, 80 percent were classified as over-the-road (OTR) drivers. For the purpose of this survey, OTR was defined as a driver who did not return to the terminal (work-reporting location) or home nightly.

The survey found the following:

34-Hour Recovery

Of the 542 drivers included in the survey, 393 (or 72.5 percent) used the 34 or more hours recovery provision at least once. For these 393 drivers, a total of 1,411 recovery periods were recorded. Looking at the length of all the recovery periods recorded in the survey (1,411), 67 percent exceeded 44 hours, 10.8 percent were 36 or fewer hours, and 4.68 percent were the minimum 34 hours. Slightly less than 27 percent of the drivers had one recovery period of 36 or fewer hours, while 11.4 percent had one recovery period of the minimum 34 hours.

11th Hour Driving

Of the 6,850 driving periods reviewed, 20.7 percent exceeded 10 hours of driving. This includes 4 percent that reflected driving beyond the 11th hour. In those cases where daily driving exceeded 11 hours, either the driver was in violation or not subject to the rule at that time. Looking just at the driving periods of OTR drivers, FMCSA found that 22.9 percent of these driving periods exceeded 10 hours of driving.

14 Hour Tour of Duty

Of the 7,262 tour-of-duty periods reviewed, 15.3 percent exceeded 12 hours, and 4.3 percent exceeded 14 hours. Looking just at OTR driver tours of duty, FMCSA found that 16.4 percent exceeded 12 hours and 4.6 percent exceeded 14 hours.

Sleeper Berth

Of the 2,928 sleeper-berth periods recorded, 68 percent exceeded 6 hours, and 52.6 percent exceeded 8 hours. A comparison of split-sleeper-berth periods found that the first period typically had longer hours (on average 1.5 more hours) recorded than the second split.

Midnight to 6 a.m. (Circadian Trough)

Of the 9,798 records evaluated, a total of 2,776 (28.3 percent) was found to have recorded duty/driving time between midnight and 6 a.m. In 1,149 of the records (or 11.7 percent) drivers exceeded 3 hours duty/driving during the midnight to 6 a.m. time period. It should be noted that 80 percent of drivers included in this survey were classified as over-the-road drivers (or those that did not return to their work-reporting location nightly), and as such, night driving may be over-represented in this sample.

Total Work Hours

On average, drivers recorded 8.78 hours of work per day (driving and on-duty not-driving), with a standard deviation in average hours worked per day of 2.9 hours. The daily hours worked produce a 7-day average of 61.4 hours.

While the drivers included in this survey are not representative of the entire interstate commercial driver population, this survey does provide a valuable snapshot of current operations (those under the 2003 rule), as well as the ''real world'' HOS habits of drivers.

I.2. OOIDA Survey

The Owner-Operator Independent Drivers Association (OOIDA) conducted a web-based survey of its members in 2004 to assess their experience with the 2003 rule. The survey comprised 17 questions and addressed such issues as the use of daily driving, the recovery period, and sleeper-berth provisions, as well as the rule's effect on income, wait times, time at home, naps, breaks, hours worked, fatigue, and other factors.

The OOIDA survey asked respondents to provide information on their type of operation by identifying themselves as either short-haul, regional, or long-haul drivers. However OOIDA provided no definitions (*i.e.*, ranges of daily miles driven) for the terms regional, short-, and long-haul driver. Of the 1,223 OOIDA members who provided such information in their survey responses, 153 (or 12 percent of respondents) identified themselves as short-haul drivers with total weekly miles averaging 2,041 and average runs (or lengths of haul) of 387 miles. According to the definition of short-haul operations used in the 2003 regulatory impact analysis (RIA), and the definition used in the RIA for this final rule, short-haul drivers are those with average lengths of haul of 150 miles or less. As such, the self-identified ''short-haul'' driver respondents to this survey represent what FMCSA considers to be regional or long-haul drivers, or those with average lengths of haul greater than 150 miles.

There were 377 respondents to this survey (or 31 percent) who identified themselves as regional drivers, for whom total weekly miles averaged 2,369 and average runs equaled 629 miles. Lastly, there were 693 self-identified long-haul drivers (57 percent) in this survey, for whom total weekly miles averaged 2,709 and average runs equaled 1,196 miles. Additionally, 666 (or almost 55 percent) of the 1,223 survey respondents indicated that they were leased to a motor carrier, 284 (or 23 percent) operated under their own authority, and the remaining 273 (or 22 percent) identified themselves as company drivers.

Regarding implementation of the 2003 rule, the survey inquired about OOIDA member use of the 11th hour of daily driving, 34-hour recovery, and split sleeper berth. Results indicate that during the month of June 2004 (the period for which information was requested), all survey respondents as a single group used the 11th hour of driving an average of 8.4 times, the 34-hour recovery period an average of 3.1 times, and the split-sleeper-berth exception an average of 4.0 times. To examine these survey results as a percentage of total work periods available to the driver, we divided survey results by 7- and 30-day periods, where applicable. For instance, we see that the 11th hour of driving was used during 28 percent of the 30 days in June (or 8.4 divided by 30). Additionally, the split-sleeper-berth-provision was used during 13 percent of the total days available (or 4.0 divided by 30). Lastly, the 34-hour recovery was used in 80 percent of the 3.9 available work weeks in June 2004 (or 3.1 divided by 3.9). OOIDA members who identified themselves as short-haul drivers tended to use each of these provisions the least. Regional drivers used the 11th hour of driving and the 34-hour recovery the most on average, and long-haul drivers used the split sleeper berth the most on average.

With regard to the rule's potential impact on drivers, one survey question asked, ''Have the new HOS regs helped you to establish and maintain a 24-hour work/rest cycle?'' 34 percent of driver respondents felt that the 2003 rule had in fact helped them to establish and maintain a 24-hour cycle, while 64 percent indicated they experienced no improvement within the first six months (two percent did not respond). Among driver types, long-haul drivers revealed the greatest improvement, with 38 percent indicating that the 2003 rule helped them establish and maintain a 24-hour cycle, while 30 percent of short-haul drivers indicated that the 2003 rule helped them to establish and maintain a 24-hour cycle.

In response to the question, ''Do you get more time at home under the new HOS regs regime?'' 20 percent felt they did in fact get more time at home as a result of the 2003 rule, while 77 percent indicated they experienced no increase

within the first six months (two percent did not respond). In response to this question, regional drivers reported the greatest improvement (22 percent), followed by long-haul drivers (21 percent), and then short-haul drivers (18 percent).

To the question, ''Do the new HOS regs allow you to get more rest and therefore reduce your level of fatigue?'' 29 percent of driver respondents replied the 2003 rule did in fact allow them to get more rest, while 60 percent indicated no improvement in rest time within the first six months. Regarding the second part of this question, 14 percent of respondents indicated that they never had fatigue. To this last question, long-haul drivers indicated the greatest improvement. Thirty-two percent received more time at home and felt less fatigued under the 2003 rule. Twenty-three percent of short-haul drivers felt that they received more time at home and therefore felt less fatigued under the 2003 rule. Driver responses to the complete set of OOIDA survey questions can be found in the docket.

I.3. Burks' Private Carrier Survey

Dr. Stephen Burks of the University of Minnesota, Morris, conducted a survey of private fleets in 2004 to determine the percentage of runs that utilized the three major provisions of the 2003 rule; namely, the 11th hour of driving, 34-hour recovery, and split sleeper berth. Additionally, several other operations-related questions were posed. A total of 31 firms responded to the survey, representing a total of 7,115 power units and 30.3 million miles traveled during the month of June 2004. The average run for this group of respondents was 537 miles, with a minimum reported run of 41 miles and a maximum reported run of 2600 miles. A more detailed summary of these survey results is included in the docket.

Results indicate that the 34-hour recovery period is the provision most used by private firms responding to this survey. The 34-hour recovery period was used on average in 61 percent of the respondents' runs. This does not necessarily mean, however, that all recovery periods utilized the minimum 34 hours recovery. In fact, as was seen in the FMCSA Field Survey, many drivers took more than the minimum required 34 hours off duty. The 11th hour of driving and split sleeper berth were used less often, according to Burks' survey. The 11th hour of daily driving was used on average in 31 percent of runs, while the split sleeper berth was used on 26 percent of runs.

The above percentages are averages, so there is variation among firms in the use of the provisions. Some private firms indicated they used each of these provisions on 100 percent of their runs, while others indicated that they never used them. As a result, when reporting mean values, any extreme outliers on either side can skew the results. Thus, the data may be better understood by examining the median value of responses to each of these questions, or the point at which half of the survey respondents indicated less use of a particular provision and half indicated more.

The median for the 34-hour recovery provision was 85 percent, indicating that half of survey respondents used the provision in fewer than 85 percent of its runs, while the other half used it in more than 85 percent of its runs (by ''run,'' it is assumed the researchers were referring to a firm's weekly runs when discussing the 34-hour recovery provision). Reporting the median value for the 34-hour recovery seems to validate the relatively high mean value reported earlier (61 percent), in that private firms appear to be utilizing this provision quite extensively. Regarding the 11th hour of daily driving, the median was 10 percent, indicating that half the firms surveyed used it in fewer than 10 percent of runs, while the other half used it in more than 10 percent. With regard to split sleeper berth, the median value was 2 percent. Thus, the median values for the 11th hour of daily driving and split sleeper berth indicate low usage of these provisions, respectively, by private firms responding to this survey.

I.4. Schneider National

At the Annual Conference of the Transportation Research Board (TRB), held in January 2005, in Washington, DC, a session was entitled, ''Truck Drivers Hours-of-Service: One Year Later.'' As part of this session, Mr. Donald Osterberg, a representative from Schneider National, Inc., one of the largest for-hire trucking companies, presented information on his company's experience under the 2003 HOS rule. During this presentation, Mr. Osterberg noted that roughly 10 percent of the Schneider fleet used the 11th hour of daily driving during the months of June and October 2004. The portion of the Schneider drivers using a sleeper berth to split their minimum 10-hour daily off-duty periods was 6 percent in early 2004, falling to roughly 2 percent in June of 2004, and falling further to fewer than 0.5 percent of drivers in October 2004. Also, Mr. Osterberg noted that between 26 and 32 percent of Schneider drivers used the recovery provision to take between 34 and 44 hours off between weekly on-duty periods. These results are consistent with those found in the FMCSA Field Survey discussed earlier. Mr. Osterberg's statements were supported by data provided upon request in a handout to FMCSA after the session. This handout consisted of various summary calculations of logbook entries pulled for the months of June and October 2004. These summaries are in the docket.

Regarding commercial drivers' current use of the most important provisions from the 2003 rule, a summary of responses from the aforementioned data sources is contained in Figure 6.

FIGURE 6.—SUMMARY OF SURVEY INFORMATION, CARRIER/DRIVER USE OF 11TH HOUR OF DAILY DRIVING, 34-HOUR RECOVERY PERIOD, AND SPLIT SLEEPER BERTH EXEMPTION

Date source	Percent of runs (daily or weekly) using HOS provision		
	11th driving hour (daily runs or on-duty periods)	34-hour recovery (weekly runs or on-duty periods)	Split sleeper berth (daily runs or on-duty periods)
FMCSA Survey	21	[1] 73	[2] N/P
OOIDA Survey	28	80	13
Burks Survey	31	61	26
Schneider National Logbook Summary	[1] 10	[2] N/P	[1] .05–6

[1] Percent of drivers (not daily or weekly on-duty periods).
[2] Not provided (NP) because of how the survey data were compiled and/or how they were reported publicly.

I.5. Virginia Tech Transportation Institute Study

An analysis was conducted of data collected from an ongoing FMCSA–NHTSA sponsored Field Operational Test of a Drowsy Driver Warning System. This on-the-road driving study, performed by Virginia Tech Transportation Institute (VTTI), began collecting data in May 2004. All data collected through May 1, 2005 were used in the current analysis [Hanowski, R.J., *et al.* (2005)]. In all, operational data were collected and analyzed from 82 CMV drivers working for one of three licensed trucking companies.

Preliminary results from this study reveal some interesting patterns concerning sleep duration. The results, based on 1,736 days of data for 73 drivers, show a mean daily sleep time of 6.28 hours with a standard deviation of 1.4 hours. Data collected from 80 truck drivers under the pre-2003 rule and with different driving schedules, found ''drivers averaged 5.18 hours in bed per day and 4.78 hours of electrophysiologically verified sleep per day over the five-day study (range, 3.83 hours of sleep . . . to 5.38 hours of sleep)'' [Mitler, M.M., *et al.* (1997), p. 755].

The ''hours in bed'' value from Mitler, *et al.* is a comparable measure to the mean hours of sleep value resulting from this new study. A study of long-haul drivers [Dingus, T., *et al.* (2002), p. 205] found self-reported sleep per night for single drivers, while on the road, to be approximately 5.8 hours. This study was conducted under the pre-2003 rule. The VTTI study also used single drivers (i.e., no teams); consequently, the Dingus *et al.* study can serve as another reference point to compare results.

In summary, preliminary results from the VTTI study have found drivers are sleeping considerably more (up to 1.5 additional hours per night on average) under the 2003 rule than either the Mitler *et al.* study or the Dingus *et al.* study found under the pre-2003 rule. One rationale for instituting the 2003 rule was to provide drivers with additional time off to provide more opportunity to obtain sufficient sleep. Based on the results of the Virginia Tech Study to-date, drivers appear to be getting more sleep per night on average, compared to data collected from drivers under the pre-2003 HOS regulations [Mitler, M. M., *et al.* (1997); Dingus, T., *et al.* (2002)].

J. Comments to Docket and FMCSA Response

Between January 24, 2005, and April 5, 2005, FMCSA received 1,790 comments from approximately 1,590 commenters on the 2005 NPRM. Figure 7 shows the number of comments by type of submitter. The number of comments, particularly for drivers, is greater than the number of individual commenters because some submitted multiple documents, answering in separate submissions each of the questions FMCSA posed.

FIGURE 7.—NUMBER OF COMMENTERS BY TYPE

Commenter type	Number of comments
Trucking Associations	20
Safety Advocacy Groups	9
Other Associations	31
Law Enforcement	4
Unions	3
Carriers	223
Drivers: Long Haul	312
Drivers: Short Haul	42
Drivers: Not otherwise specified	1,010
Other Industries	57
Others	79
Total	1,790

Of the carriers submitting comment letters, 203 letters were from for-hire firms and only 20 from private carriers; 112 identified themselves as long-haul carriers and 30 as short haul; 71 described themselves as owner-operators. It is likely that some of those classified as drivers are owner-operators, but unless they specifically stated that, they were not classified in that group. The ''Others'' group includes private citizens, a few third-party vendors, and one academic researcher; most of the private citizens may be drivers, but did not state that or provide a clear indication that identified them as drivers.

The following issue sections provide further details regarding comments submitted to this docket. Although issues are discussed one at a time, the Agency stresses that the proper focus is on their joint effects and on the resulting response. Section J.11 discusses the combination more directly.

J.1. Sleep Loss

In the 2005 NPRM, FMCSA requested information on both the beneficial and adverse effects of the 2003 rule on the health of CMV drivers, and expressed particular interest in information about any increase or reduction in sleep deprivation generated as a consequence of the 2003 rule. How much sleep do drivers operating under the new regulations average on a daily basis, the Agency asked, and how has this average changed as a result of the 2003 HOS rule.

One hundred thirty-four commenters, primarily drivers, responded to the question. Twenty-nine said that the 2003 rule made no difference to the amount of sleep they obtained, but 60 said they obtained more sleep under the new rule.

The Insurance Institute for Highway Safety (IIHS) reported that a survey it had conducted found that there was a ''slight increase in the percentage of drivers (from 40 percent in 2003 to 42 percent in 2004) who said they had driven while sleepy at least once in the past week.'' The percentage of drivers who reported actually dozing at the truck wheel on at least one occasion in the past month was 13 percent in 2003 and 15 percent in 2004.

FMCSA Response

When asked about the amount of sleep drivers were getting with regard to the 2003 rule and specifically the 10 consecutive hours off-duty provision, commenters confirm that drivers are in fact obtaining more rest today than under the pre-2003 HOS rule. An OOIDA survey referenced in Section I.2 and a joint NHTSA/FMCSA study referenced in Section I.5 of this preamble add additional support for this conclusion.

IIHS' data regarding drivers dozing while driving is not supported by current crash data; the data suggest that the number of fatigue crashes have decreased in the first 9 months of 2004 (43 fatigue crashes) compared to the first 9 months of 2003 (54). Therefore, even if the IIHS data is accurate and statistically significant, the dozing behavior does not appear to be relating to an increase in fatigue-related crashes. It is difficult to comment without knowing all of the details regarding the IIHS survey. However, based on the Agency's experience, one would expect that a two percentage point increase in reported dozing could be a function of sampling error and statistically insignificant.

J.2. Exposure to Environmental Stressors

FMCSA requested comments on how the 2003 rule, and in particular the extension of driving time from 10 to 11 hours and the shortened driving window created by the 14-hour limit, would affect a driver's exposure to environmental stressors, such as vehicle noise, vibration, and emissions.

Fifty-nine commenters, including 13 carriers, 44 drivers, one law enforcement organization, and one private citizen, responded that the 2003 HOS rule had little or no effect on

exposure to environmental stressors. They stated that modern truck technology has reduced vibration, noise levels, and emissions and that the consequences of any additional driving time were either offset by the workday restriction, or insignificant. ATA commented that potential driver exposure to diesel exhaust (DE) has decreased to a point below both Environmental Protection Agency (EPA) and OSHA requirements, and will probably further improve. ATA included tables illustrating the improvements. One carrier commented that more stringent regulations, improvements in technology and road conditions, and better maintenance practices had reduced environmental stressors.

ATA commented that modern truck cabs are much quieter, far quieter than the maximum requirement, are well ventilated, and have well designed, efficient heating and air conditioning units. Physical stress on drivers, including road vibration, is reduced by power steering. Many trucks are also equipped with automatic transmissions, further reducing stress. Improved suspension gives the driver a better ride, and provides better handling. The comfort and safety improvements in truck tractors improve the driver's conditions, leading to a reduction in stress and fatigue; and operators could drive an additional hour, ''yet be safer than drivers in the past.'' Two carriers also commented that modern trucks have greatly reduced noise and vibration. One carrier said that due to the lack of vibration, the quality of sleep in a new truck is ''great,'' while another wrote that drivers become less fatigued in the improved trucks.

In contrast to the commenters who identified little or no exposure to environmental stressors, Public Citizen, Advocates for Highway and Auto Safety (AHAS), and the National Institute for Occupational Safety and Health (NIOSH) responded with extensive summaries and citations of current research applicable to the question of exposure to environmental stressors.

Public Citizen stated that the largest source of diesel emissions is diesel-powered ''big-rigs,'' and other highway diesel vehicles. Truck drivers are constantly exposed to DE fumes, ''waiting for a load, stopping at a truck stop, or operating the truck.'' The long-term effect of breathing DE and other chemicals poses a significant potential source of risk for truck drivers, Public Citizen argued, providing numerous citations of articles and studies relating particularly to the health impacts of DE. It pointed out that while FMCSA expected that EPA emissions standards would result in a significant reduction in emissions from new diesel vehicles beginning in 2007, current, unmodified, diesel powered trucks would probably be operating through the 2030s. Public Citizen cited a report recently released by the Clean Air Task Force (CATF), of which Public Citizen is a supporting member, highlighting the toxicity of diesel emissions and numerous acute health risks associated with exposure to diesel emissions. Public Citizen concluded that ''Diesel particulate matter is well established as a probable carcinogen. * * * Moreover, fine particles have been documented by literally thousands of studies as associated with respiratory and cardiovascular diseases as well as premature mortality.''

Public Citizen disagreed with FMCSA that the impact of a one-hour increase in driving hours is unclear. Arguing that the 2003 HOS rule allowed an increase of more than 600 annual driving hours over the pre-2003 rule, Public Citizen stated that this increase represented hundreds of additional hours per year when truckers would be exposed to elevated levels of DE fumes. They concluded that ''A robust body of evidence indicates that the exhaust[s] are highly toxic and tied to a multitude of health risks, and therefore it is negligent of FMCSA to promulgate an hours of service rule that so significantly increases drivers' exposure to these fumes.''

AHAS criticized FMCSA for using in the 2005 NPRM almost exclusively studies that dealt only with commercial drivers, arguing that much relevant research literature existed in other work-related areas such as shift work fatigue and performance failures. AHAS provided numerous citations for studies that it regards as providing directly relevant findings from other occupational areas. AHAS asserted that FMCSA ignored relevant research, which it cited, from EPA and others that conclude that chronic DE inhalation exposure might be a cancer hazard for humans. AHAS also provided an extensive list of studies in the field of occupationally related whole-body vibration, and asserted that FMCSA had not included the most relevant studies in the docket.

AHAS listed and summarized numerous studies addressing the psychological and physiological effects of long working hours, irregular shiftwork, and accumulated sleep debt, and provided lists of sources of statistics and analysis on injuries and illnesses, including psychological disorders, digestive disturbances, headaches, high blood pressure, anxiety, gastrointestinal diseases, and reproductive dysfunction that it considered potentially affecting truck drivers.

NIOSH commented extensively on the issue of driver exposure to diesel fuel exhaust and other vehicle emissions. NIOSH conceded that assessing driver exposure to vehicle exhaust is complicated because of the variety of possible exposure scenarios, including driving, sitting in the cab, or working at a loading dock. NIOSH noted that few exposure assessments of commercial drivers had been conducted prior to the 2003 HOS rule and none have been conducted since. NIOSH reported that current research indicates that some health risks from DE are associated with particulate matter (PM) in emissions. EPA emissions standards have led to cleaner burning diesel fuel, and newer engines produce less PM. NIOSH wrote that DE particles increase allergic responses, and might lead to harmful structural changes in the airways, and that there is an association between PM and cardiovascular and respiratory morbidity and mortality.

FMCSA Response

Most, if not all, of the concerns raised by commenters regarding driver health have been evaluated and are addressed earlier in this preamble. FMCSA notes that the majority of commenters, particularly drivers, stated that the rule will have little or no impact on driver health. The Agency agrees with ATA's assessment that modern truck technology has reduced vibration, noise levels, and exposure to DE, and that the consequences of any additional driving time are either offset by the workday restriction, or insignificant.

Public Citizen and AHAS cited a number of studies that found an association between DE and cancer. The TRB driver health team reviewed these studies and selected studies relevant to this rulemaking to be summarized for the driver health evaluation discussed earlier in this preamble. The standards for inclusion were the validity of the methodology, the relevance of the studied population to truck driving and the quality of the statistical analysis of health outcomes. FMCSA has reviewed the research and does not dismiss the association; however, there have been significant changes in diesel engine design, changes in emissions standards, and changes in emission types and composition, which make many of these studies inapplicable to today's environment. EPA has stated there is considerable uncertainty about whether ''health hazards identified from previous studies using emissions from

older engines can be applied to present-day environmental emissions and related exposures, as some physical and chemical characteristics of the emissions from certain sources have changed over time. Available data are not sufficient to provide definitive answers to this question because changes in DE composition over time cannot be confidently quantified, and the relationship between the DE components and the mode(s) of action for DE toxicity is unclear'' [Ris, C. (2003), p. 33].

Public Citizen commented that the largest source of diesel emissions is from heavy vehicles. While that is true, DE is only one contributor to a complex pollution mixture, and there are many other combustion sources. DE from heavy vehicles represents only 23 percent of all emissions from all mobile sources. EPA models show that vehicle emissions from all mobile sources have declined significantly from 1990 to 2005 (average 35 percent reduction in emissions). DE has also declined 55 percent from 1990 to 2005 and it is projected to decline an additional 88 percent by 2030. Therefore, drivers are being exposed to less pollution than they were in the early 1990s when accurate data first became available.

Further, any health risk associated with DE will continue to diminish with planned changes in standards for diesel fuel and engines. EPA projections are based on estimates of vehicle miles traveled and new vehicles entering and old vehicles leaving the inventory, and reflect changes in vehicle emissions standards. Reductions in diesel particulate matter are occurring now; these are not reductions that will be seen in the next generation of diesel engines. The CATF study supported by Public Citizen argues that the Federal government needs to cut DE further and retrofit existing trucks to further reduce DE. However, as shown the mainstream research community has not quantitatively determined a precise dose-response relationship between DE and cancer. In fact, DE at current ambient environmental levels is not thought to be predictive of cancer; testing on rats at environmental levels has not led to the development of cancer [*Id.*, p. 35]. EPA has stated ''the DE exposure-response data for humans are considered too uncertain to derive a confident quantitative estimate of cancer unit risk, and with the chronic rat inhalation studies not being predictive for environmental levels of exposure, EPA has not developed a quantitative estimate of cancer unit risk'' [*Id.*, p. 36]. Additionally, the CATF study is based on some unrealistic and misleading assumptions. The study suggests that heavy trucks will remain in the inventory for more than 30 years; therefore changes in EPA standards will have little effect for many years [Schneider, C. G., & Hill, L.B. (2005), p. 8]. FMCSA analysis of commercial vehicle registration data from Polk & Co., a proprietary data collection firm, found that fewer than 50 percent of 2004 registered vehicles (Large Trucks over 26,001 GVWR) were greater than 10 years old and 87 percent were less than 20 years old. This means that the data being quoted in the CATF study are from a model that does not appear to be accurate—the productive life of a CMV is far less than 30 years. Potentially, this flaw could have dramatic changes in the predications regarding DE.

In addition, comments from Public Citizen, AHAS, and others regarding the increased health risk due to DE exposure are all predicated on the assumption that drivers are working more hours as a result of the 2003 HOS rule. A drastic increase in driving or on-duty time under that rule is impossible to reconcile with economic reality. The U.S. economy has been expanding strongly for some time, creating renewed demand for trucking services and a steady increase in vehicle miles traveled. But there has been no quantum leap in economic activity that would demand or support the greatly extended driving hours asserted by these commenters. Federal Highway Administration data show that the vehicle miles traveled (VMT) by all trucks increased by 26.03 percent between 1994 and 2002, the last year for which complete statistics are available. That works out to an average VMT increase of 2.89 percent per year [calculated from *www.fhwa.dot.gov/policy/ohpi/qftravel.htm].* The theoretical availability of many more driving and on-duty hours under the 2003 rule is largely irrelevant. Truckers drive to meet the demand for transportation, and VMT statistics show that demand increases (and occasionally decreases) in modest annual increments. Most of the additional demand is satisfied by adding new trucks and drivers to the motor carrier industry. The Agency has not found any data that suggests drivers are actually working significantly longer hours. Therefore, in the Agency's best judgment, drivers are not exposed to increased health risk as a result of the 2003 or today's rule.

J.3. Workplace Injuries and Fatalities

The 2005 NPRM requested comments about the impact of fatigue and loss of alertness on CMV driver workplace injuries and fatalities, and any evidence connecting workplace injuries and fatalities to specific aspects of the 2003 rule or previous HOS regulations. FMCSA explained that it was interested only in injuries directly related to the HOS regulations and operating a CMV, not other workplace injuries that are outside its jurisdiction.

Twenty-eight commenters said that the 2003 rule does not have an impact on workplace injuries. One carrier, B.R. Williams Trucking, which had reviewed the company's workplace injuries, stated that there had been neither an adverse nor a positive change related to the rule. Work schedules, hours driving, and hours off duty did not affect the company's injury rate.

Twenty-seven commenters expressed other views about workplace injuries and fatalities. Nearly all of them agreed that fatigue and loss of alertness can be a contributing factor, but some commenters pointed out that the amount of the contribution varies from one individual to another. One commenter suggested that injury and fatality statistics should be broken out by type of operation.

Other commenters were uncertain about the impact of the rule. Four thought the rule gave drivers more rest and limited their hours of work, so crashes and injuries should be reduced. Six mentioned data indicating that injuries had decreased in recent years, but they said those decreases were not necessarily attributable to the 2003 rule. Four believed the rule's lack of flexibility, the extra hour of driving allowed, or the inability to stop the 14-hour clock, could contribute to fatigue and lead to more crashes. Five commenters pointed out that many drivers' injuries occur when they are loading or unloading and said that drivers should not be required or allowed to perform these activities.

Public Citizen asserted the rule has a direct effect on injuries, and accused the 2005 NPRM of suggesting groundless limitations on FMCSA's legal responsibility to address them in the rule. For example, they stated that the ''Workplace Injuries and Fatalities'' section of the NPRM drew an ''unsupportable'' distinction between injuries relating directly to the HOS regulations and operating a CMV, and other workplace injuries and environmental stressors, such as loading and unloading. Rejecting the Agency's position, Public Citizen cited several FMCSA reports, technical analyses, and literature reviews that assessed non-driving issues, including loading and unloading, sleep apnea, and physical activity and their impacts.

Many commenters suggested workplace injuries and illnesses have decreased in 2004. The Motor Freight Carriers Association (MFCA) asked its membership to provide data and information regarding workplace injuries. MFCA's preliminary analysis of that data suggests that injuries and fatalities have decreased in 2004. They commented that ''while we are encouraged by these findings, it would be premature to attribute the results singularly to the change in hours of service rules.'' FedEx commented that ''in their pick up and delivery and their short and long haul divisions combined, there was a 5.44 percent reduction in injuries even with a 2.2 percent increase in hours worked for all employees.'' FedEx Freight reports the overall injury and illness rates for its driver population decreased by almost 4 percent from 2003 to 2004. Landstar Systems, Inc. commented that it had experienced 8.6 percent fewer on the job injuries with the 2003 HOS rule. Maverick Transportation, Inc. commented that it does not track injuries by loading/unloading, but the total number of injuries experienced by its drivers in 2004 decreased by 19 percent and crash-related injuries decreased by 30 percent compared to 2003. J.B. Hunt commented that it has on-going safety initiatives concurrent with the hours-of-service changes, so it is difficult to independently conclude that any changes in injuries are attributable to a single factor. J.B. Hunt reported that it experienced a 19 percent reduction in injuries categorized as ''driving/riding'' from 2003 to 2004. The carrier also found that injuries related to getting in and out of the truck declined by 18 percent.

FMCSA Response

The Agency agrees with ATA's assertion that the occupational injury and illness record of the trucking transportation industry has improved in the last five years. U.S. Bureau of Labor Statistics (BLS) data show that there have been significant reductions in workplace illness and injuries in the trucking industry—the number of nonfatal occupational injuries and illnesses involving days away from work has decreased from 152,803 in 1996 to 129,068 in 2001, a 16 percent decrease. Although the industrial categories changed slightly in 2003, the number of nonfatal occupational injuries and illnesses for truck drivers decreased 31 percent between 1996 and 2003.

BLS statistics for 2004 are currently being collected and analyzed and will not be available until November 2005. For this reason FMCSA requested data from the public in the 2005 NPRM regarding 2004 workplace injury and illnesses.

Many commenters cited data that showed that workplace injuries and illness have decreased in 2004. The Agency recognizes these comments are not a representative sample of the whole industry; however, FMCSA is encouraged that the information provided suggests that workplace injuries and illness appear to have decreased from 2003 to 2004. No commenters have suggested that injuries and illness have increased solely as a result of the 2003 HOS rule; nor does FMCSA.

Many commenters, particularly drivers, said that they did not see the connection between the HOS regulation and workplace injuries and illness. The Agency, based on its experience, however, believes that there clearly is a connection between driver fatigue and alertness. Further, one driver responded that ''the loss of alertness or fatigue affects a truck driver's ability to focus and judge distances causing crashes. These crashes are less prevalent under the new HOS because a driver gets more rest under these rules than under the old rules.''

Public Citizen asserted that the NPRM drew an ''unsupportable'' distinction between injuries relating to HOS regulations and other workplace injuries, which are outside the jurisdiction of the Agency. ''FMCSA expressly distinguishes injuries and fatalities relating to workplace hazards such as loading and unloading.'' The NPRM stated that FMCSA did not intend to focus on workplace injuries caused by conditions beyond the jurisdiction of the Agency [70 FR 3345], *e.g.*, falling down a staircase at a motor carrier terminal because a step was loose. OSHA has the authority to regulate that kind of threat to workplace safety. Public Citizen seems to assume that fatigue is an element in many non-driving accidents suffered by drivers, and that the HOS rule is therefore a ''major contributing factor'' to such mishaps.

FMCSA did not deny that drivers engaged in loading or unloading are subject to the HOS regulations; the 60- or 70-hour clock continues to run while drivers handle cargo. The Agency simply directed commenters' attention to injuries that are immediately related to the HOS regulations and away from loading or unloading injuries that might be caused by any number of other factors completely unrelated to HOS, such as shifting cargo, broken securement straps, inadequate packaging, incorrectly marked loads, poorly maintained forklifts, or slippery loading dock surfaces. Public Citizen concluded that ''FMCSA may not limit its statutory responsibility to driver health for only the period when a trucker is driving.'' FMCSA has not attempted to confine its responsibility to driving time. The Motor Carrier Safety Act of 1984, however, requires only that ''the [Agency's] regulations * * * ensure that * * * the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators' [49 U.S.C. 31136(a)(4)]. FMCSA is not, and cannot be, responsible for every physical infirmity experienced by truck drivers. There are many threats to health and safety in the modern world, and most of them have nothing to do with the HOS regulations. The NPRM concentrated on matters the Agency can address.

J.4. Lifestyle Choices

In the 2005 NPRM, FMCSA noted that lifestyle choices, including diet and exercise, may impact driver health and safety, but also concluded that ''Realistically, such choices cannot be regulated by FMCSA.'' The Agency requested commenters to provide information on the effect lifestyle choices, such as diet, exercise, and the use of off-duty time, have on driver safety and health.

Only 36 commenters responded to this request; all appeared to agree that proper diet and exercise are important elements in maintaining driver health, but two or three commenters were less certain about the effect of lifestyle choices on safety. Ten of the commenters insisted that healthy options are difficult to find on the road, and they were particularly critical of fast-food meals at truck stops and the lack of exercise facilities.

Ten commenters argued that lifestyle choices are individual decisions and cannot be regulated by the HOS rule, except to the extent the rule provides an opportunity for healthy choices and sufficient off-duty time. Three commenters approved of the additional off-duty time provided by the 2003 rule, but others thought the 14-hour provision made it difficult to maintain a proper diet. One commenter believed that too much off-duty time had a negative effect. Two commenters suggested that private-sector training is a more effective method of helping drivers with lifestyle choices than HOS requirements. Two other commenters mentioned FMCSA rules that require medical screening and monitoring for drivers and pointed out that those rules

already encourage drivers to maintain healthy habits.

Public Citizen, however, alleged the NPRM's ''Lifestyle Choices'' discussion was illegitimate and a disingenuous attempt to narrow FMCSA's oversight of driver health. In the opinion of this commenter, the HOS rule had significant potential to influence a driver's diet and exercise regime, which in turn could greatly influence an individual's bodyweight, blood pressure, and other health indicators. The commenter provided no research or data to support this assertion.

With regard to lifestyle choices and their effect on driver fatigue, Express Inc. commented that its ''experience indicates the lifestyle decisions made by a driver prior to getting behind the wheel as well as decisions made while on the road, are by far the most significant factors in fatigue related accidents.'' Additionally, FedEx stated that ''lifestyle choices, more than anything else, have the greatest impact on fatigue related accidents. Without question, the lifestyle choices drivers make during their off duty time are extremely significant. Coupled with decisions made on-duty during a trip, they are the most critical choices relating to fatigue prevention.'' Lastly, with regard to drivers meeting FMCSA medical requirements, Brink Farms noted that ''FMCSA can't regulate driver's lifestyle choices, but regulating their blood pressure levels is regulating driver's health. Many of our drivers have had to change their lifestyle due to higher blood pressure than allowed by these limits. Many of our drivers have begun walking more, and watching their diet more. Exercise alone keeps a driver healthier and that also keeps them more alert.''

FMCSA Response

The Agency included questions on this issue in the NPRM because lifestyle choices appear far more likely to directly affect driver health than many of the occupational and environmental factors faced by CMV drivers.

Roberts and York (1997) conducted a study for FMCSA entitled ''Design, Development and Evaluation of Driver Wellness Programs.'' They cited a number of areas where drivers make poor lifestyles choices, for instance by smoking. The percentage of smokers among truck drivers is nearly double that of the U.S. population. A 1993 study of 2,945 truck drivers reported 54 percent of the respondents smoke cigarettes or cigars [Roberts, S., & York, J. (1997), p. I–2]. In contrast, national statistics in 1996 showed that 27.7 percent of all males and 25 percent of all men and women were smokers [*Id.*]. The use of tobacco products is the leading preventable cause of death in the United States. Smoking substantially increases the risk of cardiovascular disease, causes about 30 percent of all cancer deaths, and is the leading cause of chronic lung disease [*Id.,* p. I–1]. Truck drivers who smoke in their cabs are perhaps at even greater risk of developing illnesses. They can get a double dose of toxins by inhaling smoke directly from the cigarette or cigar and by breathing in any second-hand smoke that remains inside the cab.

A significantly higher percent of CMV drivers were classified as obese compared to the population in general [*Id.,* p. I–2]. Of 2,945 truck drivers at a trade show, 73 percent were classified as being either overweight or obese. Of these drivers, 33 percent were classified as obese (*i.e.,* Body Mass Index Greater than 30) and 40 percent were classified as overweight (*i.e.,* Body Mass Index between 25 and 30) [*Id.*]. Nationally, only 33 percent of men and women combined are classified as being overweight [*Id.,* p. I–3]. In the research literature, obesity is a well-established risk factor for many diseases such as stroke, cardiovascular disease, hypertension, and diabetes. It also exacerbates problems with conditions such as arthritis or back pain. Evidence also suggests that obesity, in conjunction with other risk factors, places men and women at a higher risk of cancer [*Id.,* p. I–2].

Roberts and York [*Id.,* p. I–8) identified the prevalence of poor eating habits among CMV drivers. A 1993 study of 2,945 truck drivers revealed over 80 percent of these drivers ate only one or two meals per day and 36 percent had three or more snacks per day [*Id.,* p. I–6]. Furthermore, a 1996 study of 30 drivers in a wellness program revealed that their favorite meal item while on the road was steak or burgers and typical snacks were chips, fruit, candy, donuts, and cookies. Only 15 percent of these drivers ate five or more servings of fruits and vegetables per day, compared to 19.1 percent of all males.

CMV drivers are more likely to be inactive or underactive as compared to the population in general [*Id.,* p. I–7]. Despite the importance of regular exercise to disease prevention and health, 50 percent of the truck drivers in a 1993 study never participated in any type of aerobic exercise and only 8 percent of these drivers ''regularly'' participated in aerobic exercise [*Id.*]. The 1997 National Health Interview Survey showed 60 percent of adults do engage in physical activity for at least 20 minutes per day. Both epidemiological evidence and medical research demonstrate the ability of physical activity to reduce the risk of many physiological diseases, including heart disease, high blood pressure, osteoporosis, diabetes, and breast and colon cancer, as well as reduce the risk of psychological illnesses such as depression, anxiety, and stress [*Id.*].

On three important lifestyle variables, CMV drivers rank well below average. CMV drivers smoke tobacco at nearly twice the rate of the U.S. population, have questionable eating habits, and do not exercise regularly. As a result, twice as many CMV drivers are overweight compared to the U.S. population. These lifestyle choices are bound to have profound effects on the health and wellness of CMV drivers, and in the Agency's best judgment may, by themselves, be predictive of higher rates of cancer, cardiovascular disease, diabetes, and back problems.

J.5. Driving Time

FMCSA solicited comments in the NPRM on the impacts of incremental increases in driving time on driver health, the safe operation of CMVs, and industry economics. In particular, it asked, to what extent did the increase in maximum driving time from 10 to 11 hours affect health, safety, and economic factors?

Support for 11-Hour Limit

The majority of commenters (208 out of 360 or 58 percent) who expressed opinions on the 11-hour driving rule supported it, including the American Trucking Associations (ATA), the Truckload Carriers Association (TCA), the Owner-Operator Independent Drivers Association (OOIDA), and the National Private Truck Council (NPTC).

In all, six trucking associations expressed support for the 11-hour driving limit. ATA agreed with the 11-hour limit and said that it should be retained. However, ATA also acknowledged that the establishment of any driving time limit would benefit from continued fatigue-related research. TCA stated that the limited scientific data available did not show a significant distinction between 10- and 11-hour drive times. NPTC said that the 11-hour limit had improved the quality of drivers' rest by allowing drivers to make it all the way home and sleep in their own beds. NPTC said that if FMCSA reverted to a 10-hour limit, the drivers would have to forego returning to home each evening, or the company would have to schedule additional drivers and shipments.

The National Industrial Transportation League (NITL) said that

the additional hour of driving is warranted and justified in light of the amount of rest that drivers obtain under the 10-hour off-duty requirement. NITL said that the additional hour of driving time increases driver and asset productivity, and, in the aggregate, reduces the need to bring additional trucks onto the roads, which translates into fewer accidents. The National Armored Car Association (NACA) said that the 11-hour limit is appropriate and reduces risk to the drivers of armored cars, who are not allowed to pull off to the side of a road or stop overnight at a motel as they approach permissible workday limits, because of the risk of crime. NACA said that the additional hour provides a margin of safety for responding to such contingencies.

Five other carriers also provided substantive comments supporting the 11-hour driving limit. The carriers said that the one-hour increase in the daily driving limit has benefited them economically without having any detrimental impact on safety. Two of the carriers said their drivers had benefited from the 11-hour driving limit. ABF Freight said that some of its drivers who performed defined runs that required close to ten full hours of driving reported feeling less stress under the 11-hour driving limit. Crete Carrier Corporation said that its operation cycles indicated that its drivers' work and sleep patterns had begun to benefit from the 2003 rule. The carrier said that its drivers appeared to have adjusted their driving routines to more closely resemble the traditional workday. The carrier also said that it had teamed with shippers and consignees to schedule pick-up and delivery times that were more consistent with drivers' circadian rhythms and to decrease drivers' non-driving workload and extended detention periods.

A short-haul carrier that hauls loads with special hauling permits said the 11-hour limit had been especially helpful, because in most states it could only move loads during daylight hours. The 11-hour limit allowed drivers to take advantage of the longer daylight in the summer months to drive additional miles, thus increasing efficiency. The carrier also said that the extra hour of driving enabled its drivers to get through metropolitan areas that had a curfew during rush hour periods. Some of its drivers were now able to deliver one additional load per week, which increased driver earnings while improving the company's efficiency.

Opposition to 11-hour Limit

Opposition to the 11-hour daily driving limit came from 152 commenters, including safety advocacy groups, unions, and a minority of drivers.

Advocacy groups presented the most detailed arguments. IIHS stated that it did not believe the increase in daily driving time from 10 to 11 hours was supported by scientific evidence. Public Citizen argued that FMCSA had not presented in the 2005 NPRM any evidence demonstrating that any changes the Agency would make to the HOS rules would make the eleventh driving hour safe, much less improve safety, in accordance with the Agency's statutory mandate. These commenters argued that FMCSA had failed to demonstrate how a driver's initial restfulness can ''offset'' the safety risk presented by the additional hour of consecutive driving.

AHAS said that FMCSA had recognized and documented in its May 2000 proposed rule that the risk of a crash by a commercial driver increases at a geometric or logarithmic rate as the consecutive hours of driving increase in each shift. AHAS concluded that by allowing an eleventh consecutive hour of driving, the Agency has increased the absolute risk of commercial drivers being involved in fatigued-related crashes.

The International Brotherhood of Teamsters said that any benefits of the 10-hour rest period and the 14-hour duty-tour were offset by the one-hour increase in daily driving time and the 34-hour restart provision. The Transportation Trades Department of the AFL–CIO said that ''[r]equiring a ten percent increase in driving time as a solution to driver fatigue makes little sense.''

Some commenters suggested that drivers were being pressured to drive the entire 11 hours. An attorney with the Truckers Justice Center, who said that he had represented drivers in proceedings under the Surface Transportation Assistance Act (STAA) in which the drivers were disciplined for refusing to drive while impaired due to fatigue, opposed the 11-hour daily driving limit. He said that the Truckers Justice Center had spoken with drivers who were concerned about the new hours of service provision allowing a carrier to force a driver to drive up to 11 hours in a single tour of duty.

Several commenters presented detailed arguments in favor of a 10-hour limit. The National Institute of Occupational Safety and Health (NIOSH) said that its comments submitted to FMCSA in December 2000 were still valid. Those comments supported a limit of 10 hours of driving within a 24-hour work/rest cycle of 12 hours on duty and 12 hours of free time. NIOSH said that this daily cycle would be consistent with common scheduling practices in other industries that use shifts longer than 8 hours.

Both Public Citizen and AHAS suggested that drivers should be allowed to accrue no more than 10 consecutive hours of driving in a shift. Both added that the research literature and FMCSA itself have shown that allowing fewer than 10 consecutive hours would result in even safer operations. Several drivers also supported a 10-hour limit.

Economic Effects of 11-Hour Limit

The Corporate Transportation Coalition (CTC) stated that its few member companies that engage in long-haul operations believe the 11th hour of driving has permitted modest productivity gains. Brandt Truck Line, Inc. stated that the additional hour had improved productivity (especially in a 50-mph State) by eliminating the need to incur a sleeper-berth period during the return trip. This allowed the use of day cab tractors (not sleepers), and a miles per gallon improvement of 15 percent, and a ''gain'' of nearly 20 hours per week in scheduling continuity, which allows drivers to continue the same scheduled route each day, rather than changing routes on a day-to-day basis.

ABF Freight stated that in 2004, only 4.6 percent of its dispatches required the 11-hour rule to complete runs. While this might rise slightly should the rule become permanent, it was not likely to affect the majority of its dispatches, due to the fixed nature of its service center markets. The Overnite Transportation Company stated that the 11-hour driving rule made its operations cheaper and more efficient, because it could now haul freight directly, thus using fewer drivers and fewer tractors and trailers driving fewer miles. The company saves over $110,000 annually and is able to provide faster transit times.

Georgia-Pacific Corporation stated that productivity is an appropriate factor for FMCSA to consider because the only other alternative is to increase the numbers of trucks on the highways, with accompanying congestion and crashes.

J. B. Hunt said that it randomly selected 80 of its over-the-road drivers and tracked them for a 30-day period. The carrier found that the drivers used the 11th hour of driving only 10 percent of the time. National Ready Mixed Concrete Association (NRMCA), the Massachusetts Concrete and Aggregate Producers Association, and a carrier

stated that driving time is generally not a critical issue in the ready mixed concrete industry. NRMCA cited its 2000 Survey of Ready Mixed Concrete Truck Driver Activities and Company Operations (Appendix II), which it said showed that ''concrete delivery professionals'' on average spend less than half of their time actually driving under the U.S. DOT definition. Therefore, the 1-hour increase in driving time contained in the 2003 rule was ''largely inconsequential'' to the ready mixed concrete industry.

Health and Safety

Commenters generally reported that the increased driving time either had no impact (57 commenters) or a negative impact (62 commenters) on health or safety.

Advocacy groups saw a clear negative impact. For example, IIHS cited numerous scientific studies that it said show an increase in crash risk among drivers operating large trucks for more than 8 to 10 hours. No scientific evidence, IIHS concluded, supports the argument that the increase in the daily off-duty requirement meant that the 1-hour increase in driving time would not compromise safety.

Public Citizen argued that numerous studies demonstrate that increased fatigue and risk are associated with longer consecutive hours of driving. They claimed that FMCSA's proposed addition of an hour of driving time would add an hour of exceedingly heightened crash risk, because the latter hours of driving are the most dangerous. Further, they asserted that the proposal undermined the Agency's duty to enhance safety. It cited a 1996 study that found a strong relationship between single-vehicle truck crashes and the length of consecutive hours spent driving, with the risk of a crash found to double after 9 hours of continuous driving. Public Citizen reported another study of truck driving that found that ''Accident risk increases significantly after the fourth hour, by approximately 65 percent until the seventh hour, and approximately 80 percent and 150 percent in the eighth and ninth hours,'' respectively. They also cited FMCSA's statement in the 2000 NPRM that ''performance begins to degrade after the eighth hour on duty and that this degradation increases geometrically during the 10th and 11th hours.'' They pointed to a chart in the 2000 NPRM based on data from the University of Michigan Transportation Research Institute (UMTRI), Trucks Involved in Fatal Accidents (TIFA) database, which it said clearly showed a striking rise in the relative risk of a fatigue-related crash once drivers pass the 9-hour mark. In fact, it asserted that risk doubles between the tenth and eleventh hours of consecutive driving. Public Citizen also stated that the 1-hour reduction in on-duty hours, from 15 hours to 14 hours, is irrelevant in terms of the number of driving hours. Drivers will tend to gravitate toward the maximum driving hours possible to enhance their earnings and meet trip deadlines, they argued, and will minimize non-driving on-duty hours.

In contrast, the California Highway Patrol stated that the increased risk from the 11th hour of driving would be offset by limits on the length of the driver's overall work day.

Yellow Roadway Corporation stated that about six percent of Roadway's single man line-haul operations use the 11-hour clock. However, it was unable to break out OSHA data for those drivers. The company did compare OSHA Recordable Injury data of line-haul drivers in total for the years 2003 and 2004, and said these data show an improvement of 55 percent from 2003 to 2004. Roadway suggested that although there may not be a direct correlation to the 11-hour driving rule, the significant decrease in injury rate for the entire line-haul operation would suggest that there is no safety or health related need to change the 11-hour rule.

Alertness Solutions, a scientific consulting firm, submitted a literature review and technical argument supporting the proposition that there are very limited data to address a drive-time restriction and, from a physiological perspective, less foundation to establish how drive time relates to fatigue. The minimal data available, the commenter said, do not show significant differences between 10- and 11-hour drive times. However, Alertness Solutions agreed that a drive-time limitation could be useful in creating breaks within a duty period, and breaks have been demonstrated to be an effective strategy to maintain performance and alertness.

American Moving and Storage Association (AMSA) stated that the additional hour of driving time has had no adverse effect upon fatigue-related highway crash experience. The benefits of the existing hours-of-service rules, however, extend beyond highway safety to driver acceptance. AMSA reported that one carrier's driver out-of-service rate declined from 14 percent in 2003 to ten percent in 2004, a 29 percent improvement. That carrier's number of HOS out-of-service violations similarly experienced a 29 percent improvement. Another carrier found the number of its drivers who received false log citations during roadside inspections decreased 23 percent from 2003 to 2004. AMSA attributed this to the implementation of the 2003 rule, which more naturally fit a driver's daily routine and natural circadian cycle. AMSA also suggested that the 2003 rule is easier for drivers to understand and easier for dispatchers to work with than the former hours-of-service regulations. Moreover, the ability to drive for an additional hour provides operators of household goods moving vans the flexibility they need to arrive at a destination. Even the relatively small 1-hour addition to allowable driving time is a tremendous advantage to the operational efficiency required of all motor vehicle operations, considering the improvement in comfort, noise penetration, and maneuverability of commercial motor vehicles today that makes them less fatiguing to operate than those of even ten years ago. AMSA concluded that given the one-hour reduction in a driver's overall 14-hour duty day, the additional hour of driving time was desirable, and an equitable and balanced complement to a driver's schedule.

OOIDA reported that a survey it had conducted indicated that the 11th hour of available driving time was not always used frequently by drivers. For the month of June 2004, the average driver used the 11th hour 8.3 times. According to OOIDA, drivers reported that the occasional use of this extra driving time had given them the ability to arrive at a familiar facility where there is room to park their truck, or to get them home where they have the best opportunity for rest and restorative sleep. This 11th hour is also used to complete the delivery of a load, taking the pressure off the driver to deliver the next day. OOIDA reported that drivers said they do not believe that the extra hour of driving impaired their safe operation of a CMV, and that it often put them in a position to obtain better rest or sleep. They would like to retain this flexibility.

FedEx Corporation reported that FedEx Freight has no drivers who were consistently logging 11 hours of driving. FedEx Freight has no regular runs that require a driving time of 11 hours. Only about 2 percent of bid runs had a driving time of between 10 and 10.5 hours. No crashes had occurred after the 10th hour of driving.

Several drivers suggested that the 11-hour driving period should be limited by other requirements, or they suggested other limits.

FMCSA Response

Because of the importance of driving time to this rule and the conflicting

views of the commenters, FMCSA examined a wide range of research literature and statistical data and performed a careful cost/benefit analysis of two alternative driving limits: 10 hours and 11 hours. The agency has decided to adopt a driving-time limit of 11 hours within a 14-hour window following 10 consecutive hours off duty.

Crash Data

Although FMCSA's analysis of the available crash data is presented in detail in section H, some of the information bears repeating here.

Trucks Involved in Fatal Accidents (TIFA) Data

The TIFA file combines data on fatal crashes from FARS with additional data collected by UMTRI, including the number of hours driven since the last 8-hour off-duty period at the time of the crash.

Campbell [Campbell, K.L. (2005)] reviewed TIFA data for the years 1991 through 2002 to identify the operating conditions where the most fatigue-related crashes occur and to determine the association of fatigue risk factors with fatal crashes. He found that the majority of fatigue-related crashes occur in the early hours of the trip. This is a function of exposure, since all drivers drive in the first hour, while fewer drive in later hours, i.e., the early hours of trips are the most frequently driven. However, when examining the relative risk of a fatigue-related crash by hours of driving, the results are different. The likelihood a truck driver was fatigued at the time of a fatal crash generally increases with the number of hours driven. TIFA data show that the relative risk of a large truck being involved in a fatigue-related crash in the 11th hour of driving or later is substantially higher than in the 10th hour of driving.

TIFA data are not necessarily applicable to this rulemaking, however. Only 9 fatigue-related fatal crashes where the driver was operating in the 11th hour were recorded between 1991 and 2002. The statistical significance of such a small number is questionable. TIFA data were collected when the minimum off-duty period was only 8 hours and the driving limit 10 hours. The current 10-hour off-duty requirement means drivers have so much more opportunity for restorative sleep that the relative risk of the 11th hour of driving revealed by TIFA may no longer be relevant. Finally, UMTRI conducts interviews with drivers or carriers to supplement the FARS data, but may do so as much as a year after a crash. It is unclear whether drivers can accurately recall the number of hours they had driven that long after the event.

Virginia Tech Transportation Institute Study

The Virginia Tech Transportation Institute (VTTI) is currently conducting a real-world, empirical study of crash risk during the 10th and 11th hour of driving.

The researchers have found no statistically significant difference in the number of ''critical'' incidents in the 10th and 11th hours of driving [Hanowski, R.J., *et al.* (2005), p. 9]. The study has also determined that drivers are not measurably drowsier in the 11th than the 10th hour of driving. These results may be related to another finding, that drivers appear to be getting more sleep under the 2003 rules than they did when the minimum off-duty period was only 8 hours. Compared to four sleep studies conducted under the pre-2003 rules, Hanowski and his colleagues found that drivers operating under the 2003 rule are averaging over 1 hour of additional sleep per day [*Id.*, p. 8].

Crash Risk and Hours Driving: Interim Report II

The Pennsylvania Transportation Institute at Pennsylvania State University is currently modeling the effect on crashes of hours of driving, hours of rest, multi-day driving patterns and other factors under the 2003 rule [Jovanis, P.P., *et al.* (2005)]. This study collected records of duty status (RODS) for 7-day periods prior to crashes, as well as for a non-crash control group. The study found an increased crash risk associated with hours of driving, particularly in the 9th, 10th and 11th hours, and multi-day driving.

Comments on Crash Risk and Data

Many companies and associations submitted data on crash and injury rates. In general, their data show that crash and injury rates were lower in the year since the 2003 rule went into effect in January 2004.

ATA reported data showing that carriers had statistically significant lower average crash rates in 2004, causing ATA to believe that the 2003 rule is superior to the pre-2003 rule from the perspective of overall safety.

The information provided by commenters is not available from other sources, but there is certainly some variability in the methods and accuracy with which the data were collected. In addition, the lower crash and injury rates cannot be definitively attributed to the effects of the 2003 rule, though some commenters noted that the rule is the only major variable that changed from 2003 to 2004. Finally, the data do not reveal anything about the relative risk of the 10th or 11th hour of driving.

Fatality Analysis Reporting System (FARS)

FARS is generally recognized as the most reliable national database on fatal motor vehicle crashes. FMCSA compared the first 9 months of FARS crash data from the 2003 Annual Report with the first 9 months from the 2004 Early Assessment File (the difference is explained in Section H).

The total number of fatal crashes involving large trucks decreased from 3,120 in 2003 to 2,954 in 2004, a 5.3 percent reduction. The number of large truck crashes where the driver was coded as fatigued dropped as well. More important than either of these figures, however, are the data showing that fatigue-related fatal crashes are down from 1.7 percent of all crashes in 2003 to 1.5 percent in 2004, an 11.8 percent reduction.

Although the data are still preliminary, all FARS measures of fatigue-related crashes are trending downward. The data, of course, do not allow any firm conclusion about the extent to which the 2003 rule may have contributed to that result.

Operational Data

FMCSA gathered operational data during compliance reviews and safety audits to determine how the various provisions of the 2003 rule are being employed by the motor carrier industry. The Agency also reviewed other survey material and comments to the docket on this subject. Available data indicate that driving into the 11th hour is far from universal, with utilization rates ranging from 10 to 28 percent. FMCSA's own survey of driver records found that only 20.7 percent of the recorded driving periods exceeded 10 hours. There is no reason to believe that a full 11 hours of driving will ever become the standard for the industry. Drivers need to deal with operational, administrative, and personal matters which typically reduce driving time well below the maximum allowable hours.

As stated above, numerous carriers support the 11th hour of driving since it allows drivers to return home within a day so they can sleep in their own beds. FMCSA also notes that the provision has increased industry productivity through increased flexibility without impacting safety based on available data, specifically crash rates (see Crash Data discussion, above). A number of commenters said that, since trip lengths have not changed

as a result of the 2003 rule, the 11th hour serves primarily to reduce the stress of trying to complete a run by the end of the 10th hour. With an extra hour of driving time, drivers are able to relax a bit and perhaps drive less aggressively.

As noted in the comments, use of the 11th hour is also justified due to improvements in truck comfort, noise penetration, and maneuverability, which have decreased trucker fatigue over the past decade.

Research and Literature Review

The scientific literature on fatigue and performance factors includes notably different, and indeed inconsistent, results. The Agency found that the research on driving time is limited and the conclusions mixed. A fatigued driver is prone to perform less effectively on tasks requiring vigilance and decision-making than a person who is alert. Fatigue is associated with a higher degree of crash risk. In practice, however, it is difficult to establish the precise effect a given driving or on-duty period will have on fatigue, alertness, or driver performance. Modest differences in study designs may produce surprisingly different results.

Research on the effects of driving time falls into three categories: (1) Operational studies of on-road working environments, (2) laboratory studies under controlled conditions, sometimes using driving simulators, and (3) analysis of crash or performance data. The results are far from uniform.

Operational and laboratory studies have generally found little or no statistically significant difference in driver drowsiness or performance between the 10th and 11th hours of driving [O'Neill, T.R., *et al.* (1999), p. 48; Wylie, C.D., *et al.* (1996), pp. 5.13–5.14; Hanowski, R.J., *et al.* (2005), p. 9]. These findings are contradicted by other research involving drivers operating under the pre-2003 HOS rule. A frequently-cited 1978 study found evidence of fatigue, measured both subjectively and objectively, in less than the 10 hours of driving then allowed by the HOS rules [Mackie, R.R., & Miller, J.C. (1978), pp. 219–221]. This study, however, required a driver to take only 8 consecutive hours off-duty, which probably limited the hours actually available for sleep (as discussed later in section J.7). The 2003 rule and today's final rule provide drivers an additional 2 hours off duty, creating a much improved opportunity for 7 to 8 hours of sleep per day.

Research analyzing crash and performance data usually focuses on police reports and driver records of duty status (RODS) to establish crash-risk factors, like the time of day the crash occurred, the number of hours driven since the last off-duty period, the number of hours since the last sleep period, and the length of the last sleep period. As mentioned above, these studies typically find that the risk of a fatigue-related crash increases with the number of hours driven, and particularly after the 10th hour. On the other hand, sample sizes for the 11th hour of driving, and beyond, are very small, and data collection procedures for TIFA are less than optimal.

The evaluation of some research, particularly in the operational category, is complicated by the variations in study design and data collection.

A 1996 operational study of 80 long-haul drivers engaged in revenue-generating runs in the U.S. (under the 10-hour driving limit) and Canada (under that country's 13-hour driving limit) reported that time-on-task was not a strong or consistent predictor of observed fatigue. This study found no difference in drowsiness, as observed in video records of comparable daytime segments, between 10 and 13 hours of driving. Some measures, such as lane tracking, individual cognitive performance, and self-rating of fatigue were better at 10 hours of driving than at 13 (lane tracking was confounded by differences in driving routes and road conditions in the two countries). Conversely, reaction time was better at 13 hours of driving than at 10. The authors noted that the lack of variance in drowsiness between the driving periods may be attributable to the fact that the study measured only daytime drowsiness. Other research suggests the body's circadian rhythm limits the negative effects of longer hours during daytime operations [Wylie, C.D., *et al.* (1996), pp. 5.13–5.14].

A 1999 study evaluated the effects on fatigue and performance during a daytime schedule of 14 hours on duty and 10 hours off duty, with drivers performing simulated driving and loading/unloading tasks. The authors found mild cumulative effects on subjective measurements of sleepiness; a slight but statistically significant deterioration in duty-day subjective sleepiness, reaction time response, and measures of driving performance over the course of a week; but no cumulative deterioration of driver response in crash-likely situations. The authors reported that a schedule of 14 hours on duty (with 12 hours of driving) and 10 hours off duty for 5 consecutive day periods did not appear to produce significant cumulative fatigue over the 2-week testing period [O'Neill, T.R., *et al.* (1999), p. 48].

Breaks, Naps and Driver Fatigue

The Agency considered a mandatory rest period (break) to mitigate any possible fatigue related to the 11th hour of driving. Scientific research suggests that rest breaks, including naps, while not reducing accumulated fatigue, refresh drivers and enhance their level of performance and alertness on a short-term basis [Belenky, G. L., *et al.* (1987), p. 1–13 ; Wylie, D. (1998), p. 13]. The Agency concluded that such a break would be difficult for State and Federal enforcement personnel to verify and would significantly interfere with the operational flexibility motor carriers and drivers need to manage their schedules.

Still, FMCSA encourages carriers to establish a break or napping policy as part of an overall fatigue management program. Several studies have shown that a nap during a night shift can lessen the fatigue felt overnight [Matsumoto, K., & Harada, M. (1994), p. 899; Rogers, A.S., *et al.* (1989), pp. 1202–1203]. A study found that a 20-minute ''maintenance'' nap helped to improve daytime self-rated sleepiness and performance levels on a variety of tasks, including logical reasoning, mathematical calculations, and auditory vigilance [Hayashi, M., *et al.* (1999), p. 272]. Research suggests that a short nap of 10 to 20 minutes (but generally for less than 45 minutes) can provide a beneficial boost in driver alertness.

Driver Health Impact

The issue of CMV driver health is complex, and involves many external factors (lifestyle, diet, and other personal behavior/choices) that are beyond the scope of the HOS rules. As discussed above (Section E—Driver Health), FMCSA found little research on a possible relationship between HOS regulations and driver health. Longer driving time increases driver exposure to diesel exhaust and chemicals, noise, and vibration, but dose/response curves clarifying the effect of such exposure do not exist. Therefore, in the Agency's best judgment, the difference between a driving limit of 10 and 11 hours is inconsequential from the standpoint of driver health.

Conclusion

Available information on the effect of allowing 11 hours of driving time is inconclusive. TIFA classified only 9 fatal crashes that occurred in the 11th hour of driving as fatigue-related between 1991 and 2002. Whatever the statistical risk of driving in the 11th

hour, FMCSA cannot make a reasonable choice between a 10- and an 11-hour driving limit on the basis of only 9 fatal crashes over a 12-year period.

The on-going studies by the Virginia Tech Transportation Institute and the Pennsylvania Transportation Institute seem to have reached completely incompatible conclusions. The latter finds that the 11th hour of driving poses a significant crash risk while the former detects no statistical difference between the 10th and 11th hours of driving. The different methods used by both research teams appear to be valid.

Trucking industry comments to the docket generally reported lower crash and injury rates in 2004 than in 2003. This reveals nothing about the 11-hour driving limit or the 34-hour restart provision, nor can the improvements be clearly linked to the 2003 rule, but it certainly implies that the 2003 rule has not harmed highway safety.

Preliminary FARS data show that fatigue-related fatal crashes as a percentage of all CMV fatal crashes were down in the first nine months of 2004 compared to the same period in 2003. This is consistent with the information provided in motor carrier comments to the NPRM. The data do not allow a calculation of crash risk for each additional hour of driving. It is also possible, however unlikely, that the FARS Early Assessment File for 2004 does not accurately reflect the data in the 2004 Annual Report, which was not available when FMCSA conducted its analysis.

In summary, the available crash data do not clearly indicate whether the 11th hour of driving, combined with 10 hours of off-duty time, poses a significant risk.

An 11-hour driving limit is favored by most motor carriers and drivers, and is economically beneficial to some carriers. On the other hand, it provides no real advantage over a 10-hour limit for many short-haul carriers. Advocacy groups and some drivers prefer shorter driving times, though there is no consensus on what the shorter limit should be. Use of the 11th driving hour varies widely among motor carriers and individual drivers, but all available data show utilization rates far below 50 percent. The research literature on driver health is not sufficiently detailed to differentiate between any possible effects of a 10- and an 11-hour driving limit. Like the crash research and data, the comments and operational data do not point unambiguously toward a single conclusion.

FMCSA carried out a cost/benefit analysis of a 10- and 11-hour driving limit and other aspects of this final rule, as reported in section K.1 and the stand-alone Regulatory Impact Analysis (RIA) filed in the docket. Motor carrier operations were modeled in detail. The Agency used a time-on-task multiplier which assumed that the crash risk from the 10th to the 11th hour of driving increased based on the TIFA data. The analysis demonstrated that a 10-hour driving limit would save no more than 9.3 lives per year compared to an 11-hour limit. The annual net cost of a 10-hour limit, however, compared to an 11-hour limit, would be $526 million ($586 million in gross costs minus $60 million in safety benefits). A 10-hour driving limit would cost more than $63 million per life saved.

While the Agency did not explicitly estimate the marginal costs and benefits of limiting daily driving to 8 or 9 hours, FMCSA believes that such changes would be even less cost beneficial than a 10-hour driving limit and would allow a driving/rest cycle less consistent with driver circadian rhythms than an 11-hour limit. See section H for further discussion of this issue.

FMCSA is required by statute both to improve motor carrier and driver safety and to consider the costs and benefits of its requirements [49 U.S.C. 31136(c)(2)(A) and 31502(d)]. The Department of Transportation currently uses $3 million as the ''value of a statistical life'' (VSL) for rulemaking purposes. Because a 10-hour driving limit would cost $63 million per life saved, compared to an 11-hour limit, the VSL for the lower limit would be 21 times the DOT standard. A $63 million VSL is over six times higher than the maximum VSL cited by the Office of Management and Budget (OMB) in its guidance to Federal agencies on conducting regulatory impact analyses, *i.e.*, $10 million [OMB Circular A–4, p. 30]. The Agency cannot impose regulatory costs so far in excess of regulatory benefits. FMCSA expected the new 10-hour off-duty period required by the 2003 rule to reduce driver fatigue and improve safety, despite allowing 11 hours of driving time instead of 10 hours. Many, though not all, motor carriers have reported lower crash and injury rates under the 2003 rule, and preliminary FARS data show that fatigue-related fatal truck crashes have declined as a percentage of all fatal CMV accidents. This suggests that the pre-2003 studies and data showing a sharply increased crash risk in the 11th hour of driving may no longer be relevant because drivers have used the 10 off-duty hours required by the 2003 to reduce fatigue. It is thus FMCSA's judgment that the $526 million net cost of a 10-hour driving limit is too high to justify the potential benefits it would generate. Today's final rule therefore sets the maximum allowable driving time at 11 hours after 10 consecutive hours off duty.

J.6. Duty Tour

In the 2005 NPRM, FMCSA requested comments on the impacts of the 2003 rule decrease in the duty period for drivers from 15 non-consecutive hours to a non-extendable 14 consecutive hours.

Impacts on Safety and Health

Almost 600 drivers and about 100 carriers, as well as OOIDA, the National Association of Small Trucking Companies, CTC, and NPTC, urged that breaks, meals, and time spent loading and unloading be exempted from the 14-hour duty tour. A substantial majority of commenters, mostly drivers and owner/operators, opposed the change from 15 cumulative hours to 14 consecutive hours of on-duty time. Drivers, in particular, stated that the consecutive duty time requirement caused them to skip meals or naps when they were needed, and generally increased stress that leads to speeding and more aggressive driving. Several commenters believed the opportunity to work 14 consecutive hours compromised safety and favored a return to the previous requirement of 15 cumulative duty hours. Most of the commenters cited the need for meal breaks and other breaks for rest and exercise to be ''off the clock,'' so drivers are not penalized for taking time to eat a meal or nap when they feel fatigued. Several trucking associations cited fatigue as the primary impact of the consecutive 14-hour rule. Because, they claim, drivers are discouraged from taking breaks to rest or have a meal, they drive straight through causing fatigue and stress. Two associations noted that the consecutive 14-hour rule has the unintended consequence of increasing the number of driver layovers, meaning that drivers more frequently sleep away from home, even though studies cited by FMCSA suggest that drivers who return home every day experience fewer fatigue-related, serious crashes than those who sleep while on the road. Many commenters urged FMCSA to revise the HOS rules to allow a driver to extend the 14-hour window by up to two hours by taking off-duty rest breaks throughout the day as needed. The Minnesota Trucking Association (MTA) reported that 51 percent of its drivers took naps to supplement sleep or maintain alertness. However, of the 49 percent who did not nap, 42 percent

said that the 14-hour consecutive duty rule discouraged naps.

The 131 commenters who approved the change to 14 consecutive duty hours made a variety of arguments in its favor. Several commenters believed the change was a positive one because it prevents shippers, receivers, and companies from abusing the off-duty hours and forcing drivers to use them as unpaid time. The National Industrial Transportation League (NITL) commented that 2003 rule ''supports driver productivity because the 14-hour window allows drivers ample time to perform such tasks as loading, unloading, fueling, vehicle inspection, and completion of paperwork that are part of a typical day.'' Advocates for Highway and Auto Safety stated that a return to a cumulative measure of duty time would restore the abusive practices that prevailed with the previous HOS rules, including the ability of shippers and receivers to intimidate drivers to wait in line for loads, load and unload their freight, and exceed maximum driving hours by concealing these actions as ''off the clock'' rest or meal breaks. Several commenters also noted that the consecutive hours requirement would promote safety by keeping drivers on a 24-hour circadian schedule.

Economic Impacts

Several carriers noted that the 14-hour rule had increased their productivity and made their fleets more efficient. One carrier stated that the rule allowed it to pressure customers to speed up loading and unloading. In concert with a positive economic environment, this allowed a rate increase. Another carrier noted that the consecutive 14-hour rule made it easier for a company to audit and manage driver hours, and that the rules were easier for drivers to understand and log their time accurately. The general consensus among drivers was that their workday, on average, is shorter under the new rules. They no longer work 20-hour days due to the 14-hour consecutive requirement. One driver stated that this is because shippers and receivers are more aware of the time restrictions that drivers face and do not delay drivers as long as they did in the past.

The NITL commented that shippers have made significant changes. For example, ''operations at loading docks have been reconfigured to decrease dwell time and to expedite loading and unloading in order to minimize driver on-duty time not devoted to driving, and to maximize driving time with the new 14 consecutive hour rule.'' The changes were necessary given the ''new'' value associated with a driver's time. They too suggest that shipper and motor carrier operations have become more efficient in response to the 14-hour duty tour rule.

Several other carriers, however, stated that the consecutive 14-hour rule had caused a loss of productivity and fleet utilization, while increasing costs, thereby reducing profits. Some commenters noted that the inflexibility of the consecutive 14-hour rule disproportionately affects small businesses, many of which are forced to hire additional drivers to accommodate irregular delivery schedules. A few of these commenters also cited public safety concerns associated with the lack of flexibility. For example, the National Propane Gas Association stated that nearly 60 percent of its members are experiencing difficulty in handling emergency or after-hours calls requiring an immediate response. Short-haul drivers also stated that the 14-hour rule had increased costs and reduced productivity and driver earnings. The American Bakers Association surveyed its members and estimated the cumulative cost increase to its companies' distribution systems to be between 12 and 15 percent. Several commenters noted that the impacts to short-haul drivers are more significant than those imposed on long-haul drivers. Four commenters cited FMCSA's admission that, while the benefits of the new HOS rules accrue mostly to long-haul drivers, the cost burden falls largely on short-haul operators.

Two carriers stated that the consecutive 14-hour rule imposes an economic penalty on long-haul drivers who wish to take a rest break and decreases their earning potential by not allowing the 14 hours to be extended.

FMCSA Response

Under the pre-2003 HOS rule, a driver could extend the 15-hour on-duty period by taking breaks during the day. Thus, the pre-2003 rule permitted an operator to drive after having been at work over 15 hours. The Agency ended this in the 2003 rule, by prohibiting drivers from extending their on-duty period with ''off-duty'' breaks. The 2003 rule prohibited driving after the 14th consecutive hour of beginning work or coming on-duty. This created a non-extendable period within which the driver could drive up to 11 hours and effectively ended the allowance of breaks to extend daily duty tours. The Agency's research found time spent working (and not simply time spent driving) contributes to a driver's fatigue and thereby impacts performance in long-haul operations [Williamson, A.M., *et al.* (1996), pp. 713–717; Williamson, A.M., *et al.* (2000), pp. 43–44; Van Dongen, H.P.A., *et al.* (2003), p. 125].

In developing this final rule, the Agency considered whether the scientific research, studies, data, and comments justified adopting a 14-hour driving window, or required some other provision. As noted earlier, a number of commenters, drivers in particular, reported that the consecutive duty time requirement causes them to skip meals or naps when they are needed, and generally increases stress and leads to speeding and more aggressive driving. After a thorough evaluation of the data and comments, FMCSA has decided to allow drivers to drive up to 11 hours within a 14-hour window after coming on duty.

Crash Data

The crash data reviewed by the Agency in developing this rule is discussed earlier in Section H. Several motor carriers and associations submitted data with their comments reflecting a decrease in crash and injury rates in 2004 compared with 2003. The data suggest a positive improvement in safety performance. It is impossible to definitively link a specific provision of the 2003 rule with the improved safety performance during 2004; however, the research and crash analysis show longer continuous work hours can increase the risk of a fatigue-related crash, as discussed later in this section. Further analysis suggests that the crash-impact of longer work hours is more specifically associated with large CMVs (greater than 26,000 pounds). Analysis of 1994–2002 crash data found that these CMVs account for 87.3 percent of all fatigue-related fatal crashes [Campbell, K.L. (2005)].

Operational Data

Based on the recent FMCSA survey [See Section I, FMCSA Field Survey Report (2005)] of 7,262 tour-of-duty periods, the Agency found that 15.3 percent exceeded 12 hours and 9.2 percent exceeded 13 hours. Looking at over-the-road (OTR) driver tours of duty, 16.4 percent exceeded 12 hours and 9.4 percent exceeded 13 hours. These data show that the vast majority of drivers are not using the full 14-consecutive hour duty tour. The data suggest that drivers represented in the survey have time available within the current 14-hour duty tour to take breaks. The survey findings are based upon the review of 269 motor carriers, of which 85.9 percent (231) were for-hire motor carriers and 14.1 percent (38) were private motor carriers. Of the for-hire motor carriers surveyed, the majority

(96.3 percent) were considered over-the-road. In contrast, of the private motor carriers surveyed, a slight majority (57.6 percent) were considered local. Additionally, the majority of motor carriers surveyed were classified as a truckload (92.6 percent) [FMCSA Field Survey Report (2005), p.4].

Research & Literature Review

As described earlier in Section D, the Agency initiated an extensive review of scientific literature and research in developing this rule, which included the use of subject matter experts to assist in the effort.

The Agency found general consensus within the research that cumulative wakeful hours have a direct correlation with a person's alertness and ability to maintain performance. Specifically, longer wakeful hours result in alertness and performance degradation. The research conclusions are conflicting, depending upon the type of research conducted, on the specific number of hours after which the degradation in alertness and performance adversely affect a driver's ability to safely operate a CMV.

A 1999 simulator study found only a negligible difference in fatigue between a typical day (morning to evening) shift of 10- or 12-hour duty day and a 14-hour day. This same study found that ''a daytime work schedule of 14-hours on-duty with a 10-hour off-duty period for a 5-day week did not appear to produce cumulative fatigue'' [O'Neill, T.R., *et al.* (1999), pp. 37–41].

A more recent study (2000) of New Zealand CMV drivers found ''0.05% BAC (Blood Alcohol Content) equivalence occurred at between 17 and 19 hours of sleep deprivation for most tests. This means that after around 17 hours of wakefulness, a person's performance capacity is sufficiently impaired to a level of concern for safety'' [Williamson, A.M., *et al.* (2000), pp. 43–44]. Another study of 48 healthy adults under standardized laboratory conditions found the critical wake period beyond which performance began to lapse was statistically estimated to be about 16 hours [Van Dongen, H.P.A., *et al.* (2003), p. 125]. These findings are generally consistent with comments by Alertness Solutions, which emphasized the importance of continuous wakefulness as a predictor of fatigue [Alertness Solutions, (2005) NPRM Docket comments].

The role of continuous wakefulness is important in predicting fatigue, and thereby protecting driver safety and consequently public safety. Therefore, a duty period provision to control driver work hours is an important component of the HOS regulatory scheme. There is consensus among researchers that a schedule that promotes a 24-hour clock is beneficial in creating regularity of work/sleep schedules. Researchers also agree that individuals need 7–8 consecutive hours of sleep per day. The 14-hour duty tour along with a 10-hour off-duty period meets both of these universally accepted findings. This final rule promotes movement toward a 24-hour clock and provides all drivers with the opportunity to obtain 7–8 consecutive hours of sleep per day.

Driver Health Impact

As discussed earlier, an FMCSA driver health team, despite extensive efforts, found little research to evaluate the specific impact or association between the specific hours driven or worked and CMV driver health. One can conclude, based upon the research, that sleep, along with hours worked, plays a role in a person's overall health.

If long work hours adversely affect driver health ''which current research does not clearly indicate ''the 14-hour limit will protect drivers better than the pre-2003 rule. Drivers ordinarily are not allowed to extend their duty tour beyond 14 hours. The 14-hour provision is a substantial improvement over the pre-2003 rule, with its 15-hour limit extendable by the amount of off-duty time taken during the duty tour, because this provision generally reduces daily work hours and any associated health effects. However, drivers operating under the new short-haul rule (described in section J.10) are allowed to drive up to the end of the 16th hour twice a week. There is no evidence that this short-haul schedule adversely affects drivers' ability to drive safely, and there is no available information on the health implications of an occasional 16-hour workday.

Conclusion

After thorough consideration of the research studies, crash and operational survey data, and comments to the NPRM, the Agency has decided to prohibit driving after 14 consecutive hours after coming on duty. The Agency believes the information is clear on the need to limit the cumulative hours that a driver may work and continue to drive.

It is the best judgment of the Agency that a 14-hour non-extendable duty tour period, in conjunction with 11 hours driving and 10 hours off duty, will reduce driver fatigue, promote driver health, and improve CMV transportation safety.

J.7. Off-Duty Time

In the NPRM, the Agency requested comments on the extent to which the increase in the minimum off-duty time from 8 hours to 10 hours affected driver health, the safe operation of CMVs, and economic factors in the CMV industry. Of the 452 commenters who discussed the off-duty requirement, 270 (60 percent) approved of increasing off-duty time to 10 hours. For drivers who commented, the level of support was the same; 60 percent of the 366 expressed approval of the increase.

Impacts on Health and Safety

A substantial majority (73 percent) of the comments on the health and safety impacts of the 10-hour break included positive consequences, particularly comments from drivers, but also from carriers.

ATA, National Ready Mixed Concrete Association (NRMCA), National Industrial Transportation League (NITL), the Specialized Carriers and Rigging Association, the California Highway Patrol (CHP), the International Brotherhood of Teamsters, and three carriers said the increase in mandatory off-duty time gives drivers enough time to get 8 hours of sleep as well as to attend to other personal needs. The AFL-CIO, CHP and a carrier said that the 10-hour off-duty requirement, when combined with the consecutive 14-hour on-duty requirement, benefits drivers by putting them on a 24-hour daily schedule. Grammer Industries, Inc. said that the 10-hour off-duty requirement provides its drivers with the ability to exercise, take care of personal hygiene matters, eat meals, and spend time for relaxation. The carrier said that any break over 10 hours makes drivers out on the road ''nervous'' and causes them stress.

Commenters also pointed out detrimental impacts. Werner Enterprises and two drivers said that the 10-hour period posed problems for over-the-road drivers. Werner explained that because the break must be a full 10 hours, which is often more than a driver needs for sleep and daily personal maintenance, many drivers are frustrated when they wake because they must wait an additional 3 to 4 hours before they can go back on duty. The 10 hours off has little impact on long-haul drivers' personal or family activities because they are generally away from home then.

J.B. Hunt also argued that the change had a negative impact on long-haul drivers. It reported surveying 697 drivers. The survey found that 32 percent indicated that going from 8 to

10 hours off was the ''least liked'' part of the new 2003 rule. The reason given by many was that they must now begin looking for parking locations by late afternoon or be forced to use ramp areas or other less safe break locations. Because there is no flexibility in requiring 10 consecutive hours of break time, with the limited exception for split-sleeper periods that do not allow drivers to take care of their basic needs, drivers must often try to sleep in less-than-optimal sleeping conditions. Eleven drivers said that 10 hours off-duty is overly restrictive for those drivers who do not need 8 to 10 hours of sleep per night. Over-the-road and team drivers, in particular, found 10 hours too long. Boston Sand and Gravel stated that the rule does not necessarily lead to increased sleep time, based on personal choices of the drivers in their use of off-duty time. Massachusetts Concrete and Aggregate Producers Association, Inc. also argued that 8 hours of rest was sufficient. ABF stated that most of its drivers would have preferred retention of the 8-hour rest period when away from home but liked the 10-hour period at home.

Other commenters recommended a more substantial increase in the required break. NIOSH reiterated its support for a 24-hour work-rest cycle of 12 hours on-duty and 12 hours of free time. They also observed that the 12-on/12-off daily cycle is consistent with common scheduling practices in other industries that use shifts longer than 8 hours. IIHS said that the increase in required daily off-duty time is an important improvement, but it asserted that a 10-hour off-duty requirement still is inadequate for drivers to obtain restorative sleep and attend to other daily requirements. AHAS said that solo drivers should have at least 10 consecutive hours off-duty that are taken in a single block of time, regardless of whether that off-duty rest time is taken in a sleeper berth.

McCormick proposed that any rest period equal to or greater than 10 consecutive hours, within a 24 hour period, be considered the driver's sleep time. Under this approach, rest would be defined as sleep time, unloading delay time, or delays due to equipment breakdown.

Kimberly Clark agreed that valid science supported a 24-hour work-rest cycle. However, it recommended reducing the mandatory break from 10 to 9 hours and allowing for a short nap during the duty day.

Economic Impacts

Those carriers that commented generally said that the 10-hour break has a negative economic impact on them. One carrier stated that its trucks idle during each rest period, and longer periods reduce motor life and increase fuel costs. In addition, the trucks are less productive. Brandt Truck Lines reported an increase in drivers and vehicles of 15 to 25 percent, depending on schedules and how ''tight'' the operation was under the old regulations. Similarly, Colorado Ready Mixed Concrete Association stated that for overnight projects and during peak seasons, companies have had to hire additional drivers to comply with this provision of the regulation. However, ABF Freight and another carrier reported minimal impact.

Relatively few drivers commented on the overall economic impact of the 10-hour off-duty period. One driver stated that the incremental increase in the minimum required off-duty period resulted in drivers making less money, as they are usually paid by the mile or trip, and more off-duty time means fewer miles or trips. Another driver said the rule increased frustration because it diminishes a driver's income.

FMCSA Response

After thoroughly evaluating all of the information gathered, FMCSA has decided to require drivers to take a minimum of 10 consecutive hours off duty.

Crash Data

The Agency has reviewed studies related to crash risk based upon the hours off duty and opportunity for sleep. Studies of truck drivers, [Lin, T.D., *et al.* (1993), p. 9; McCartt, A.T., *et al.* (1997), p. 63] point specifically to increased crash risk and recollections of increased drowsiness or sleepiness after less than 9 hours off duty. A study by the National Transportation Safety Board [NTSB (1996), p. 37] found the most critical factors in predicting fatigue were the duration of the most recent sleep period prior to the crash, length of time since last sleep period, sleep over the preceding 24 hours, and split-sleep patterns. Drivers in fatigue-related crashes averaged 5.5 hours of sleep in the most recent sleep period prior to the crash (6.9 hours in the last 24 hours), while drivers in non-fatigue-related crashes averaged 8.0 hours of sleep (9.3 hours in the last 24 hours).

Operational Data

As discussed earlier in Section I, industry surveys found that the 2003 rule, with a minimum of 10 consecutive hours off duty, has generally improved driver rest (less fatigued) and encouraged movement toward a 24-hour work/rest cycle. The Minnesota Trucking Association (MTA) commented that a survey of their members found the 10 hours off has reduced fatigue, by providing more sleep and promoted better health. A study directed by FMCSA with VTTI (See Section H), which began monitoring 82 CMV drivers in May 2004, has found that drivers on average are getting more than an hour more sleep daily under the 2003 rule. This finding is based upon comparisons of the VTTI data collected through May 1, 2005, to findings reported in research studies conducted under the pre-2003 rule.

In addition to the operational data and surveys received from commenters, drivers submitted comments reporting that under the 2003 rule they have more time at home and obtain more rest, resulting in reduced fatigue. The Agency believes that the increased sleep reported through industry surveys, operational data, and commenters can be attributed to the additional 2-hours off-duty time provided by the 2003 rule.

Research & Literature Review

As mentioned, FMCSA has found general consensus among scientific researchers regarding the human physiological need for 7–8 hours of sleep to maintain performance and alertness.

Studies performed in laboratory settings, as well as studies assessing operational situations, have explored the relationship between sleep obtained and subsequent performance [Dinges, D.F., & Kribbs, N.B. (1991), pp. 98–121; Bonnet, M.H., & Arand, D.L. (1995), pp. 908–11; Belenky, G., *et al.* (1994), pp. 127–135; Dinges, D.F., *et al.* (1997), pp. 274–276; Belenky, G.L., *et al.* (1987), pp. 1–15 to 1–17]. These studies generally found poorer performance levels when sleep is restricted. More recent studies [Balkin, T., *et al.* (2000), p. ES–8; Belenky, G., *et al.* (2003), pp. 9–11; and Van Dongen, H.P.A., *et al.* (2003), p. 124] found that even a relatively small reduction in average nighttime sleep duration (*i.e.*, approximately 6 hours of sleep) resulted in measurably decremented performance. Another report [Rosekind, M.R., *et al.* (1997), pp. 7.2–7.5] concluded that ''scientific data are clear regarding the human physiological requirement for 8 hours of sleep to maintain performance and alertness.'' ''Therefore, an average individual who obtains 6 hours of sleep could demonstrate significantly degraded waking performance and alertness * * *'' In addition, the authors found the effects of sleep loss/deprivation to accrue, and stated,

''* * * data have demonstrated that not only does the sleep loss accumulate but that the negative effects on waking performance and alertness also are cumulative and increase over time.''

A past study of 80 over-the-road drivers in the U.S. and Canada, [Wylie, C.D., *et al.* (1996), p. ES–10] found that drivers obtained nearly 2 hours less sleep per principal sleep period than their stated ''ideal'' (5.2 hours versus 7.2 hours).

In a survey [Abrams, C., *et al.* (1997), pp. 11–12] of 511 medium- and long-distance truck drivers in the United States, the authors found no statistically significant differences in the stated rest needs among various categories of drivers (owner-operator, company driver, regular route, irregular route, solo, or team). On an average day, a driver reported needing an average of 7 hours of sleep.

In 1998, an expert panel [Belenky, G., *et al.* (1998), p. 7] convened to advise the Agency on potential hours-of-service regulations for CMV drivers. The panel reported that ''off-duty hours must include enough continuous time off duty so that drivers are able to meet the demands of life beyond their jobs and are also able to obtain sufficient uninterrupted rest.'' In addition, the panel recognized that ''although there is no guarantee that off-duty time will be spent in sleep, sufficient sleep cannot occur unless there is enough time allowed for it.'' The panel concluded that, ''the time allotted for sleep [off-duty time] must be a minimum of 9 [hours].'' The observations and recommendations made regarding continuous daily time off duty for CMV drivers supports the Agency's decision in this final rule to adopt the 10-hour provision.

FMCSA is convinced, based upon the research, that drivers need the opportunity for 7 to 8 hours of consecutive sleep to maintain alertness and performance, and reduce fatigue on a daily basis. The Agency recognizes there are individual differences in the amount of sleep needed. However, the research overwhelmingly supports that on average humans require between 7 and 8 consecutive hours of sleep per day to restore performance. The Agency must ensure that this rule sufficiently provides for the average sleep needs of all CMV drivers. Establishing a rule requiring less than the average would result in sleep restriction over time that would lead to increased fatigue and reduced performance, thus elevating crash risk and compromising safety.

Driver Health Impact

As discussed earlier, FMCSA found, despite its extensive literature review, little conclusive research to evaluate the specific impact or association between the specific hours driven or worked and CMV driver health. Anecdotally, one can conclude, based upon the research, that sleep plays a role in a person's overall health. Sleep deprivation has been associated with poorer health and increased health related problems, most notably cardiovascular disease, diabetes, and general health risks associated with obesity. The research supports 6–8 hours of sleep on average, as having a positive impact upon a person's health. Therefore, from a driver health standpoint, it is important that drivers be afforded the opportunity to obtain this amount of sleep. Based on the research that led to the 2003 rule, FMCSA knew that short sleep (sleep less than 6 hours) among drivers was a concern from both a safety and health perspective. As a result, FMCSA increased off-duty time from 8 to 10 consecutive hours, thereby increasing the driver's opportunity for sleep by up to an additional two hours per day. Data, highlighted earlier, from multiple sources confirm that CMV drivers are obtaining more sleep as a result of the 2003 HOS rule, averaging more than an extra hour daily.

Conclusion

After thorough consideration of the research studies, crash analysis reports, operational survey data, and comments to the NPRM, it is the Agency's best judgment that a requirement for a minimum of 10 consecutive hours off duty is essential to give drivers the time needed to obtain restorative sleep every day. The Agency believes scientific research is clear on the need for 7 to 8 hours of sleep to maintain alertness and performance. Lack of sufficient sleep results in greater risk of involvement in a fatigue-related crash, and is associated with health-related complications. To ensure that drivers are afforded the opportunity to obtain 7 to 8 hours of sleep, the rule must afford a period of time greater than the minimum required for sleep. Drivers report being more rested, now that they have been afforded the opportunity to obtain 7 to 8 hours of sleep due to the increased off-duty time. Adopting this provision acknowledges the importance of ensuring that the duration of the most recent sleep period before each duty tour is adequate to eliminate fatigue on a daily basis. The Agency's decision to adopt a 10-hour off-duty provision results in no new cost implications, compared to the 2003 rule.

In addition, the Agency believes that a 10-hour off-duty period coupled with the 14-hour duty tour will promote movement within the industry toward a 24-hour clock. A 14-hour non-extendable duty tour, in combination with the longer off-duty period, enhances the opportunity for drivers to achieve restorative daily sleep compared to the pre-2003 rule by eliminating the opportunity for the duty period to be extended. Ensuring that drivers have the opportunity for sufficient sleep, coupled with moving toward a 24-hour schedule, will reduce driver fatigue, promote driver health and improve CMV transportation safety.

J.8. The 34-Hour Restart and 60/70-Hour Rules

Introduction

The following summarizes discussions contained in this and earlier sections of this preamble that are pertinent to the 34-hour restart and the 60/70 hour rules.

This rulemaking addresses the phenomenon of driver fatigue, *i.e.*, the partial and occasional total loss of alertness resulting from insufficient quantity or quality of sleep. Sleep plays a critical role in restoring mental and physical function, as well as in maintaining general health. For most healthy adults an average of 7 to 8 hours of sleep per 24-hour period has been shown to be sufficient to avoid detrimental effects on performance.

It has been well established that mental alertness and physical energy rise and fall at specific times during the circadian cycle, reaching lowest levels between midnight and 6 a.m., with a lesser but still pronounced dip in energy and alertness between noon and 6 p.m. Changes of two or more hours in sleep/wake times cause one to become out of phase with the circadian cycle.

Circadian de-synchronization results from irregular or rotating shifts that are not anchored to a 24-hour day (*i.e.*, that start and end at different times each day), resulting in poor quality sleep and leading to accumulated fatigue. Sleep loss over several days leads to a degradation in alertness and driving performance. Sleep loss over extended periods or during night work can result in cumulative fatigue. Recovery from cumulative fatigue requires an extended off-duty period. CMV drivers who repeatedly obtain less than their daily requirement of sleep incur a sleep debt of some magnitude. In serious cases, the resulting cumulative fatigue can increase the driver's crash risk.

Recovery time is needed to erase the effects of sleep loss on performance, and in aggravated cases, to restore the mind and body to normal functioning.

FMCSA has determined that the research on CMV drivers supports the assessment that a recovery period of 34 hours is sufficient for recovery from cumulative fatigue. The importance of two night (midnight to 6 a.m.) rest periods was highlighted in the 1998 HOS expert panel report. The majority of drivers (about 80 percent) are daytime drivers, who would likely start their recovery period between 6 p.m. and midnight, and therefore these drivers would have the opportunity for two full nights of sleep prior to the start of the next work week. Also, in examining the operational data, FMCSA has determined that many drivers are extending their recovery periods beyond 34 hours, making it even more likely that they are getting 2 full nights of sleep. More than 50 percent of drivers are getting 3 nights of sleep. FMCSA has concluded from its review of the few scientific studies of recovery periods that 34 hours off duty provides enough time for drivers to recover from cumulative fatigue that might occur during multi-day operations.

In adopting the 34-hour recovery period, FMCSA has taken into account the weekly accumulation of driving and on-duty time allowed during each 7- and 8-day period, the adequacy of the 34-hour recovery, the costs versus benefits of retaining restart, the overwhelming support of the 34-hour recovery by the transportation industry, including motor carriers and drivers, the long-term effect on driver health, and the overall safety aspects of adopting this provision.

Support for Restart

Of the 564 drivers who commented on the 34-hour restart provision, 465 or 82 percent support it. Drivers cited a number of reasons why they like the 34-hour restart. It is long enough for them to get adequate rest before returning to work, but it is short enough that it does not significantly lessen their earnings. The provision gives drivers more time at home, gives them back the full allowable 70 hours for the coming 8-day week, and allows drivers to change shifts easily.

Nearly all of the 113 carriers (including owner-operators) that discussed the 34-hour restart favor it. FedEx Corporation (FedEx) noted that the ''vast majority'' of FedEx Ground's contractors and their drivers use the restart provision, and anecdotal evidence from those contractors supports the 34-hour restart as a way to allow for sufficient rest and to address any potential HOS compliance issues. J.B. Hunt Transport said that it had conducted a survey of 697 drivers and that 67 percent of them thought the 34-hour restart provision was the ''most liked'' aspect of the new HOS rule. Schneider National, Inc. said that it had interviewed 46 experienced drivers and they all voiced support for the 34-hour restart provision, because the restart, in combination with the 10-hour off-duty requirement, prevents the build-up of cumulative fatigue.

Crete Carrier Corporation reported that since January 2004, its drivers more frequently request and receive longer periods of time off between consecutive days of driving in order to utilize the 34-hour restart. The carrier said that it now sees drivers proactively scheduling extended off-duty recovery periods into their workweeks and returning after these extended periods with ''positive attitudes and appearing rejuvenated.'' A regional carrier said that the restart provision benefits drivers by giving them a full day away from work to rest and relax. One carrier said its drivers haul over-dimensional loads that they cannot move on Saturday afternoons and Sundays in a number of states. With the 34-hour restart, however, these drivers get their 70 hours back after waiting out the weekend. Another carrier urged FMCSA to keep the restart provision because it directly affects its ability to retain and recruit drivers.

Eighteen trade associations (trucking and other industries) also commented in favor of the provision. They cited benefits for both drivers and carriers. The associations said that the restart provision provides carriers with additional flexibility and allows increased productivity. In addition, they said that drivers are able to get home earlier and more often than they could under the pre-2003 rule.

Opposition to Restart

A total of 109 commenters disapproved of the 34-hour restart period. Those drivers that opposed the 34-hour recovery period cited a number of reasons. For example, one thought it is too short to provide sufficient restorative sleep for short-haul drivers, and another thought it too long. Other drivers suggested that some carriers are forcing drivers to sit at truck stops for 34 hours rather than letting them spend their off-duty time at home. For example, one driver explained that ''A dispatcher can run a driver out of time (60/70 hours). Then set him/her at a truck stop for 34 hours, 100 miles from home, then put him/her back on the road for another 60/70 hours. At least the old way, a driver could get home for a day or two. This way, the dispatcher can keep a driver out for a long time.''

Public Citizen called the 34-hour restart provision one of the most harmful aspects of the proposed rule and strongly urged that it be eliminated. The group said that drivers should not be able to restart their driving hours by taking only 34 hours off duty. Public Citizen thought that drivers should be afforded a weekly off-duty period that includes at least two to three nights of rest after a week of driving.

AHAS also opposed allowing drivers to restart their driving hours by taking only 34 hours off duty. It stated that drivers should be guaranteed the opportunity of at least three separate periods of sleep that are each equivalent to about 8 hours of sleep per night. It recommended that drivers have approximately 56 to 60 hours off duty before starting a new tour of duty, so that they can return to a regular pattern of waking and sleeping. AHAS referenced previous instances in which FMCSA acknowledged the importance of sleep periods taken at night. AHAS asserted that no research has shown that drivers can eliminate their fatigue, recover alertness and performance, and appropriately expunge an accumulated sleep debt with a 34-hour rest period. Furthermore, the group said that FMCSA had adopted the 34-hour restart provision ''in the face of a wealth of contrary evidence * * *.''

The Insurance Institute for Highway Safety (IIHS) maintained that there is no scientific basis for the 34-hour restart rule. The group questioned the applicability of the 1999 study by O'Neill *et al.*, which FMCSA cited as support for the 34-hour restart provision. IIHS noted that the study considered the effects of a 58-hour off-duty period, not a 34-hour period, and said that the study's authors cautioned about generalizing the results to operations with different characteristics. IIHS also noted that other studies have not reached the same conclusions. According to IIHS, a 1997 observational study of over-the-road drivers found that a 36-hour recovery period was inadequate, and a 2005 analysis of data from a national LTL firm suggested that there may be increases in crash risk associated with off-duty periods as long as 48 hours.

The Transportation Trades Department of the AFL–CIO also asserted that the 34-hour restart contributes to the physical exhaustion of drivers, because they receive only 34 hours off duty before beginning another ''marathon'' 7- or 8-day work assignment. The union said that the

restart provision dramatically cuts into the time drivers who operate on a weekly schedule would otherwise have to recover, catch up on sleep, and spend with their families. The International Brotherhood of Teamsters claims that any benefits of the 10-hour rest period and the 14-hour tour of duty provision are offset by the increase in driving time and the use of the 34-hour restart provision. The union asserted that the 34-hour restart has become mandatory for most drivers who are not protected by collective bargaining agreements. The union said that their collective bargaining agreements do not provide for the use of the 34-hour restart. Despite this fact, the union does not think that the companies for which its members work have been competitively disadvantaged.

Elisa Braver, University of Maryland School of Medicine, asserted that there is an absence of scientific evidence that the cumulative sleep deficits and fatigue incurred by working 60 hours can be remedied by having 34 hours off duty. She said that the scientific evidence cited by the Agency in support of the 34-hour restart is marred by small numbers, inapplicability to the driving population, and failure to study the effects of having 34 hours off after working according to the schedule permitted by the rule. As an example, Braver said that the study cited by O'Neill [O'Neill, T.R., *et al.* (1999)] featured small numbers of volunteers in driving simulators following a schedule unlike that of typical drivers who had 58 hours off between five-day work shifts. Braver cited a 2005 study which purportedly showed that 34 hours is an insufficient period for recovery [Park, S-W., *et al.* (2005)]. Braver cited another study [Belenky, G., *et al.*, (2003)] that she said indicated recovery from sleep deprivation can take longer than 48 hours.

Adequacy of 34-Hour Recovery To Eliminate Fatigue

By a large margin, the commenters who directly discussed the effect of the restart on fatigue said that it is long enough to provide sufficient restorative sleep, regardless of the number of hours worked prior to the restart. Of the 132 commenters who addressed the topic, 113 said that 34 hours is long enough to provide sufficient restorative sleep.

The Owner Operator Independent Drivers Association (OOIDA) noted that none of its members had reported needing more than two consecutive nights to obtain restorative sleep. The association said that drivers who use their 10 hours off duty to get sufficient restorative sleep never accrue a sleep deficit, so they are more than prepared to operate safely after the 34-hour restart. ATA said that the restart provision has improved the sleep/rest recovery period for drivers and enhanced their quality of life. It believes that the provision encourages carriers to more regularly schedule extended off-duty periods for drivers and that drivers are seeking to take that time off as a result of the restart provision. ATA also noted that the provision has helped to avoid the shifting of daytime to nighttime schedules, which research indicates can affect circadian rhythm and decrease alertness. CR England, Inc. said that the 34-hour restart offers irregular-route, long-haul drivers great relief from fatigue and sleepiness. The carrier noted that the restart is particularly beneficial to its drivers who want the rest but prefer to not spend their off-duty days away from home. The carrier called the restart provision a ''win-win situation for the driver'' because it allows higher earnings, enhanced safety, and improved family morale.

Alertness Solutions provided a lengthy commentary on the rule. It stated that the 34-hour period provides sufficient time for two 8-hour sleep periods and one 18-hour period of intervening wakefulness that should allow recovery from a cumulative sleep debt. The daily 10-hour off-duty period is intended to minimize or eliminate any acute sleep loss, so any cumulative sleep debt that might exist under the HOS rule should be minimal or none. Any sleep debt that might occur under the rule should be sufficiently ''zeroed'' in the context of the 34-hour restart period. Alertness Solutions also argued that there are no scientific data that specifically address the number of work hours per week (or per month or per year) that would be required to cause fatigue serious enough to reduce performance, alertness, or safety. However, limiting the number of work hours in a specified timeframe is a common approach used in scheduling practices and in regulatory policies to address fatigue. Often these weekly limitations are calculated based on the daily limitations. For example, Alertness Solutions pointed out that a 14-hour duty limit, worked for 5 days yields a total of 70 hours of work. If considered in terms of historical practice related to a five-day workweek and two days off for a ''weekend,'' 70 hours of cumulative work hours in a 7-day period is consistent. As reflected in the FMCSA rule, these total work-hour limitations are even more conservative than this calculation. Also, because the daily limitations on duty and the provided off-duty rest are intended to minimize or eliminate acute fatigue, they represent a rational basis for calculating the cumulative work hours total. A core premise in the weekly work-hour limitations is that they both restrict the total work hours and provide a recovery period within a certain timeframe. The 34-hour restart specifically addresses the recovery opportunity. Although there is no scientific basis for the weekly work-hour limitations, there are scientific data to address the recovery issue. Alertness Solutions also said there are some studies that have consistently demonstrated that two nights of sleep result in performance and alertness recovery following significant sleep deprivation.

AHAS, however, said that FMCSA did not (and could not) demonstrate that drivers utilizing the 34-hour restart provision are no more fatigued and are just as safe as drivers were when operating under the prior regulatory regime. AHAS claimed that FMCSA ''simply relied upon its rulemaking authority to pronounce new, more demanding HOS requirements and to assert, without specific support anywhere in the record, that this expansion in driving hours and reduced time off would nevertheless somehow generate a net gain in safety.''

IIHS agreed that FMCSA ignored studies showing an association between long driving hours and reports of falling asleep at the wheel of a large truck. IIHS added that among drivers it had interviewed, those reporting work hours longer than 60–70 per week, or other hours-of-service violations, were 1.8 times as likely to report falling asleep while driving during the month prior to their interviews as drivers who reported they worked fewer hours.

IIHS also critiqued Alertness Solution's comments. IIHS believes that the studies it referenced were not based on commercial vehicle drivers, but were primarily experiments that examine the effects on simulated performance of continuous hours of wakefulness, not time on task. IIHS said that the Alertness Solution commentary did not consider the range of factors that may affect sleep debts among truck drivers (*e.g.*, split rest time in a sleeper berth) and their ability to get adequate recovery sleep in the real world. For example, IIHS noted that for many drivers the 34-hour recovery period occurs on the road rather than at home.

Public Citizen thought that none of the research cited by FMCSA justifies a restart that provides for only two sleep periods, regardless of the time of day.

The group asserted that the minimum weekly recovery period that is supported by studies cited in the NPRM and earlier rulemaking notices is two consecutive nights of sleep. According to Public Citizen, the 1999 simulator study concluded that two full nights and one intervening day—about 32 hours off duty—would be a minimum restart period, although the study actually studied 58-hour recovery periods and never looked at recovery periods brief as 32 hours. The group also said that another study cited by the Agency, performed in 1997, found that when participants using simulators received 36-hour and 48-hour recovery periods after four workdays, ''there was no objective evidence of driver recovery.'' Public Citizen also said that a 1997 literature review, which attempted to assess scientific support for a 36-hour restart, found no such support, and in fact found only one study even dealing with an operational schedule that allowed such a brief weekly recovery. Public Citizen quoted the authors that this was because ''such a short reset period would result in schedules that would exceed current hours-of-work regulations in most countries.''

Regarding the current 24 consecutive hour restart for utility service drivers, groundwater well transporters, and construction material truck drivers, which is not affected by this rule, Public Citizen noted that in 2000 FMCSA conceded that it ''ha[d] found no sleep or fatigue research that supports any of the current exceptions or exemptions, including the 24-hour restart provisions.'' The group said that at that time FMCSA recommended that these drivers be provided a weekly recovery that included at least two consecutive nights of sleep.

The California Highway Patrol said that the 34-hour restart rule should be increased for all CMV drivers from 34 consecutive hours to 58 consecutive hours. This would allow a driver time to commute, a minimum of three uninterrupted 8-hour rest periods, and 2 full days off duty before returning to work with zero hours on their 60/70-hour rule. Several drivers suggested that the restart period should be shorter (*e.g.*, 24 hours) when drivers are on the road. One driver said, ''Spending 34 hours (less sleeping time) doing nothing in a truck stop is more fatiguing than working.'' Another driver suggested that the restart period should be only 24 hours for team drivers.

Length of the Recovery

Nearly half of the 87 commenters who discussed the appropriate length of the restart period suggested that it should be 24 hours; 48 hours was the next most popular choice. Sixteen commenters voiced approval for 34 or 36 hours.

Use of Restart

FMCSA requested information on how frequently the restart provision is being used. Ninety-five commenters responded, of whom 68 said that restart is being used weekly. Sixteen commenters said that the restart provision is being used one to three times per month. OOIDA indicated that among the members it surveyed, the 34-hour restart is the most consistently used feature of the current HOS rule, but it would be inaccurate for FMCSA to assume that all drivers are continuously maximizing use of the weekly 60 or 70 hours by using the 34-hour restart. NITL believes that substantial and/or continuous use of a ''21-hour day'' by drivers is a hypothetical result, rather than a likely consequence of the 2003 rule in the real world. NITL goes on to state that as a practical matter drivers must take breaks and complete non-driving tasks over the course of the day, such as meals and mandatory vehicle inspections. IIHS stated that among the drivers it interviewed, more than 90 percent said they used the restart provision during 2004. IIHS said a large majority reported that the restart provision was part of their regular schedule. J.B. Hunt Transport reviewed the work record of 80 randomly selected over-the-road drivers for a 30-day period, and found that 74 percent of them used the 34-hour restart at least once during that period. On average, the drivers accumulated 62.25 hours per eight-day period. Werner Enterprises, Inc. said that its drivers use the 34-hour restart extensively and that they report feeling adequately rested after doing so. Schneider National said that 26.1 percent of its driver breaks are between 34 and 44 hours.

Interaction of Weekly 60/7 and 70/8 Rules With Restart

FMCSA explained in the 2005 NPRM that, under both the pre-2003 and 2003 rules, most drivers are prohibited from driving after reaching a maximum of 60 hours of on-duty time in any consecutive 7-day period, or 70 hours in any consecutive 8-day period. Of the 106 commenters who addressed the topic, 80 (75 percent) expressed opposition to the weekly limits and particularly their interaction with the restart provision.

IIHS stated that, although the rule purports to maintain the prior 60/70-hour limits on ''weekly'' driving, the restart provision actually allows drivers to log up to 88 hours of driving during an 8-day period (an increase of up to 30 percent), and up to 77 hours of driving during a 7-day period (an increase of up to 25 percent). IIHS claims that many drivers have dramatically increased their multi-day driving and work time, and they may do so week after week. Such a change should be allowed only if there is convincing scientific evidence that beginning another week of driving after such a short period of rest will not adversely affect safety.

Public Citizen agreed that weekly driving and on-duty time would be radically increased under the rule. Under 7- or 8-consecutive-day limits, the most exhausted drivers, that is, those driving the daily maximums repeatedly, would in practice receive the longest weekly recovery period, while those driving and working less would reach the 60-hour or 70-hour limits later in the week and have a shorter weekly recovery time. The 34-hour restart, on the other hand, has the effect of allowing truckers who maximize their driving to drive more per week with less required recovery time. Public Citizen said scientific studies show that as drivers log more hours on the road over multiple days, their performance declines. They concluded that drivers should not be able to accrue more than 60 hours of driving over 7 consecutive calendar days or more than 70 hours of driving over 8 consecutive calendar days. Fewer hours of driving would further improve safety.

In contrast, Alertness Solutions stated that once any cumulative sleep debt has been erased through recovery sleep, an individual should be considered rested and without any acute sleep loss or sleep debt. From a physiological perspective, after a 34-hour restart period, a driver would be considered to have zero sleep loss, acute or cumulative, and be appropriately rested for duty. Alertness Solutions suggested that any subsequent duty hours accrued would be accrued from a rested or ''zeroed'' sleep loss calculation and added to the following total of work hours. Adding these subsequent work hours retroactively to a ''weekly'' total, after a recovery period, is misleading and inappropriate. Alertness Solutions said the weekly timeframe is an arbitrary constraint in this physiological context. While the total hours can be calculated to be higher in a ''week'' by adding retroactively, this ignores the physiological status of a driver who should be rested and ready for duty. In fact, the primary objective of a recovery or restart period is to ''zero out'' any

accumulated fatigue effects and have a rested operator prepared for duty.

Limits on Use of Restart

The NPRM asked whether a driver who has already exceeded 60 hours on duty in 7 days, or 70 hours in 8 days, should be permitted to utilize the 34-hour restart at any time, or should instead be required to take enough days off duty to be in compliance with the 60-/70-hour provision before beginning the restart period. An Agency policy directive issued on November 25, 2003, provides guidance to roadside law enforcement officials on how to implement the 34-hour restart provision, when drivers have exceeded the 60/70 hour rule. The current policy guidelines require drivers to come into compliance with the 7/8-day weekly duty time before applying the 34-hour restart provision.

J.B. Hunt Transport argued that if the purpose is to punish the driver for working over the 60 or 70 hours (which they can do without a violation as long as they do not drive), then the driver who exceeds the 60 or 70 hours should be required to wait before using the restart provision. On the other hand, if the purpose is to ensure the driver is rested and safe, then many of the current studies and reports would support allowing the restart at any time. J.B. Hunt urged FMCSA to clearly indicate which of these two purposes it has chosen. The carrier said that the current regulatory wording is not consistent with the interpretive guidance that has been issued by the Agency.

OOIDA questioned FMCSA's interpretation of the 2003 rule, which appeared to mean a driver who has driven for 59.9 hours in 7 days or 69.9 hours in 8 days, respectively, could use the 34-hour restart, but a driver who has driven 60.1 or 70.1 hours would be required to go off duty for as many as three days before being allowed to return to duty or begin a 34-hour restart period. OOIDA said it is unaware of any study that supports the conclusion that drivers whose driving time is separated by just minutes need such dramatically different amounts of off-duty time to obtain restorative sleep. OOIDA asserted that a driver could obtain more than sufficient rest during a 34-hour restart regardless of whether the driver has exceeded the 60- or 70-hour rule. OOIDA asked FMCSA to withdraw its interpretation of the rule or to change the language of the rule. FedEx said that if a driver exceeds the rule's limits, the driver is in violation and should be held accountable. However, if a driver exceeds the rule's limits, either in the non-driving mode, which is legal, or in the driving mode, which is not, the 34-hour restart should reset the driver's clock to zero. FedEx noted that otherwise there is no foundation for enforcement. Because a driver is only required to carry the previous seven days' logs, it is impossible for a field enforcement officer to look back far enough to know if a reset was legitimate or not. Because a driver cannot legally drive after 70 on-duty hours in eight days or 60 on-duty hours in seven days, and given the impracticality of enforcement, FedEx Freight proposed that the restart be applicable to those cases in which a driver exceeds the 70-hour or 60-hour limit prior to the restart.

Robert Transport suggested that a driver should be allowed to use the 34-hour restart in any circumstances. The carrier said that when drivers exceed their weekly limit, it is usually because of unpredictable events such as a snowstorm, an unusually long wait at a border crossing, or an excessive loading or unloading time. The carrier did not think that drivers should be penalized in these situations by having to wait before utilizing the restart.

In contrast, the CHP asserted that drivers must be in compliance with the applicable cumulative total before using the restart provision. The CHP said that if a driver is allowed to use the 34-hour restart provision without regard to the 60/70-hour rules, the driver could easily work in excess of 98 hours in an 8-day period before driving is prohibited. A regional carrier also said that drivers should have to wait until they are below the 60/70-hour period before using the 34-hour restart. Otherwise, a carrier could send a long-haul driver back out on the road after only one day off, which the commenter said was insufficient time off.

Economic Impact of Eliminating Restart

FMCSA requested comments on the impact of eliminating restart in terms of productivity, annual revenues, and operational costs. Responding to FMCSA's request, 68 commenters (49 drivers, 18 carriers, and one trade association) indicated that eliminating the 34-hour restart would have a negative economic impact on the trucking industry.

J.B. Hunt Transport said that eliminating the restart provision would have a negative impact on the company, but the company had not quantified it. A sample of its drivers averaged 62 hours on duty in 8 days, which indicated that the drivers were not using the restart provision to work the maximum number of hours possible. Given that fact, J.B. Hunt reported that eliminating the restart provision would not necessarily reduce the number of hours that its drivers worked each week. Roehl Transport estimated that eliminating the restart provision would reduce its productivity by 1 to 2 percent. The carrier believed that it would also incur higher fuel costs, because drivers would be waiting at truck stops more often and would burn the fuel to maintain comfortable cab temperatures. The carrier also thought that drivers would spend more money for meals and other living expenses, because they would be spending more time waiting while out on the road. A regional carrier of agricultural products noted that there are only certain times of the week when its drivers get tight on hours under the rolling weekly limits on hours. The carrier said that if the restart provision were eliminated, it would have trouble hiring drivers to work for only a few days a week. It also believed that its overhead costs would increase.

Brandt Truck Line, a short-haul carrier, said that eliminating the restart provision would not affect local carriers operating under the 60/70 weekly limit, but it would hurt the productivity of local operations working under the 70/8 limit. The carrier noted that those carriers either would have to revise their local Monday-to-Friday work schedules to be four days (14 hours each), or would have to reduce the hours of each 5-day driver from 14 hours per day to 11.67 hours per day. The carrier would then have to hire one additional driver for every seven drivers that it currently employs. Perishable Distributors of Iowa indicated that eliminating the 34-hour restart would hurt it financially because it would not be able to use the 16-hour rule as often. (As provided by § 395.1(o)(3), drivers who have returned to their normal work-reporting locations for the five previous tours are allowed to operate up to the 16th hour once a week, unless they take a 34-hour restart during that week.) The carrier said it would also have a labor issue, because it would have to shorten its routes and create more of them. The drivers would be working fewer hours, creating financial hardships.

Safety and Health Impact of Eliminating Recovery

FMCSA asked about the health impact and the safety impact of eliminating the 34-hour restart. Both carriers and drivers said that elimination of the restart provision would be harmful to driver health.

Werner Enterprises and Roehl Transport stated that elimination of the 34-hour restart would likely have a deleterious effect on driver health, and

would encourage drivers to adjust their work schedules to let them run every day without taking a day off. For long-haul drivers it would mean more non-productive sitting and waiting time during a week in a truck stop. The carriers asserted that wasting time results in a host of medical and life-style issues, including over-eating, frustration, stress, and a general feeling of job dissatisfaction in an industry where turnover is a significant issue. Drivers away from home during the week need to be allowed to work as much as they would like within the confines of safe operations. Maverick Transportation had no data to support a negative impact on health and safety but believed that elimination would have a big impact on driver lifestyle and morale. J.B. Hunt Transport said that removing the restart could have an adverse affect on drivers' health and could also negatively impact crash frequencies, because its drivers appear to use the restart as much to reduce stress and to obtain longer periods of rest when needed as they do to simply work and drive longer. Two carriers stated the restart impacts drivers' health positively because they start fresh after the period of time off that is spent at home the majority of the time. Two other carriers, however, noted that it would have no impact.

One driver thought that eliminating the restart provision would contribute to older, experienced drivers leaving the industry. The resulting increase in the number of newer drivers would increase the number of crashes, fatalities, and injuries. Another driver said that elimination of the provision would increase the number of drivers who violate the HOS rules. Two drivers noted that the restart allows them to stay on a regular 24-hour cycle, and changing it would disrupt the cycle. Three drivers stated that elimination would increase driver stress. One driver stated that by the end of the 8-day cycle, drivers are working odd hours because they are trying to work around what they did 8 days before. If they start over after being off duty for 34 hours they will not be punished for working the week before. Without the restart they must sometimes drive a short day and work long hours during the early morning hours in order to make deliveries. This disrupts their sleep cycle and directly contradicts what the new regulations are supposed to correct.

Finally, as described earlier under ''Opposition to Restart,'' several groups, including Public Citizen, AHAS, and IIHS expressed strong opposition to the restart provision.

FMCSA Response

Based on the scientific data and comments it has received, FMCSA has decided to prohibit drivers from driving after reaching a maximum of 60 hours of on-duty time in any consecutive 7-day period, or 70 hours in any consecutive 8-day period. The Agency will also allow any 7- or 8-day period to end with the beginning of any off-duty period of 34 or more consecutive hours. FMCSA has determined that a 34-hour recovery period permits a majority of drivers to have enough time for two uninterrupted nights of 8 hours recovery sleep before returning to work in a new multi-day duty period. While the research on adequate recovery periods is somewhat limited, there is general agreement that two nighttime periods (midnight to 6 a.m.) are sufficient for full recovery from fatigue. Data reviewed by FMCSA shows that 22 percent of CMV driving takes place at nighttime, between midnight and 6 a.m. [Campbell, K.L, & Belzer, M.H. (2000), p. 115]. Many of these drivers would have to sleep during the day. However, the 34-hour recovery period would give drivers who perform the other 78 percent of driving (between 6 a.m. and midnight) an opportunity to obtain two nights of recovery sleep prior to starting the next work week. In adopting the weekly limit and recovery provisions, the Agency considered all relevant research, appropriate economic factors, and comments received on the NPRM addressing driver health and public safety.

In the 2000 NPRM, the Agency proposed to require a weekly off-duty period or ''weekend'' which would have imposed a regulatory requirement for a weekly off-duty period containing two midnight to 6 a.m. blocks for all CMV drivers (65 FR 25562). In the 2003 rule, FMCSA explained that it opted for a 34-hour restart provision in light of the concerns expressed by commenters that the proposed ''weekend'' requirement would increase daytime congestion and accident risks and produce irregular sleep schedules (68 FR 22477). Commenters pointed out that the ''weekend'' proposal ''assumes that every driver is subject to weeklong sleep deprivation.'' FMCSA admitted that it ''may have overreached trying to prevent the most extreme abuses by imposing restraints on the whole driver population'' [*Id.*].

Studies indicated that cumulative fatigue and sleep debt can develop over a weekly period, and at least two nights of sleep are needed to ''restore'' a driver to full alertness [Belenky, G., *et al.* (1998), p. 13; Jovanis, P.P., *et al.* (1991), p. 2; Linklater, D.R. (1980), p. 198; Williamson, A.M., *et al.* (1994), p. 104]. The Agency determined that the 34-hour recovery period, which is based on a full 24-hour period plus an additional 10-hour period available for sleep, is the minimum restart which would provide adequate restorative rest. FMCSA explained in the 2003 rule that it considered a number of competing factors and opted for a uniform rule that ''represents the best combination of safety improvements and cost containment that can realistically be achieved'' (68 FR 22457). In the 2005 NPRM, FMCSA reiterated that, ''The 34-hour restart was considered as a flexible alternative to the ''mandatory weekend'' proposed in the 2000 NPRM * * * [70 FR 3348].

The D.C. Circuit criticized FMCSA for neither acknowledging nor justifying that the 2003 rule ''dramatically increases the maximum permissible hours drivers may work each week'' (*Public Citizen,* at 1222–1223). In the 2005 NPRM, the Agency explained that the restart provision provides an opportunity for increases in the total hours of permissible on-duty time in a 7-day period, after which a driver may not drive a CMV, from 60 hours to 84 hours. It also provides an opportunity for increases in the maximum driving time permitted in a 7-consecutive-day period (from 60 hours to 77 hours). Likewise, the restart provision provides an opportunity for increases in the total hours of permissible on-duty time in an 8-day period, after which a driver may not drive a CMV, from 70 hours to 98 hours and, provides an opportunity for increases in the maximum driving time permitted in an 8-consecutive-day period (from 70 hours to 88 hours). A number of advocacy groups argue that these extra on-duty and driving hours virtually guarantee that drivers are far more fatigued under the 2003 rule than under the pre-2003 regulations.

Several commenters argued against retaining the recovery period. Their comments can be placed into three related categories: (1) Two nights of sleep are needed for full recovery; (2) science does not support the 34-hour recovery period; and (3), the recovery period should be eliminated or increased in length due to the potential for drivers to significantly increase their daily and weekly working hours. The Agency decided to adopt a 34-hour recovery period based on an extensive scientific review of the literature, data, and comments. Adopting a recovery period is based upon seven main points: (1) Impacts of potentially longer weekly hours; (2) Operational data; (3) Economic impact of the rule; (4) Review

of the literature regarding recovery and fatigue; (5) Public comments; (6) Public safety and operational concerns and (7) Health impacts of eliminating or modifying the recovery provision.

Impacts of Potentially Longer Weekly Hours

Some of the commenters paint a picture of drivers working every additional hour allowed by the 34-hour recovery provision, and accumulating dangerous levels of fatigue. As indicated by the docket comments of motor carriers and industry associations, these images have little to do with the real world. Information collected and analyzed by FMCSA shows that most drivers are taking longer recovery periods than the minimum 34-hour recovery period that FMCSA is establishing under this rule. FMCSA believes the average driver is not, and cannot realistically, drive and work the longer weekly hours, on a regular basis, as described by some of the commenters.

The 2005 FMCSA Field Survey (see Section I.1) shows that between July 2004 and January 2005, 393 drivers used 1,411 recovery periods. The survey found that 95 percent of recovery periods exceeded 34 hours in duration. Figure 8 shows that 50 percent of the recovery periods were longer than 58 hours, in contrast to 5 percent that were only 34 hours long. The data appear to confirm that, in fact, a majority of drivers are obtaining two midnight to 6 a.m. sleep periods.

FIGURE 8.—RECOVERY PERIODS

[Local & OTR]

Restart period (hours)	Instances	Percent
34	66	
35 to 58	635	45
>58	710	50
Total	1411	100

Source: 2005 FMCSA Field Survey.

In the 2005 NPRM, the Agency acknowledged that a driver using the 34-hour recovery period could work a maximum of 77/88 driving hours or 84/98 driving and other on-duty hours depending upon which weekly rule the motor carrier operated under (*i.e.*, 60/7 or 70/8). It is highly unlikely that drivers could, in practice, continually maximize their driving and on-duty time and minimize their off-duty time. Many of the larger carriers that commented to the 2005 NPRM agreed that in most instances drivers do not consistently have the opportunity, nor are they taking it, to accumulate the maximum amount of driving and on-duty hours that are theoretically allowed under the 2003 rule. For example, J.B. Hunt Transport said that a sample of its drivers averaged 62 hours on duty per 8 days under the 2003 HOS rule, which indicates that the drivers are not using the restart provision to work the maximum number of hours possible. Werner Enterprises, Inc. also, said that there has been no significant change in the number of hours worked by its drivers as a result of the 34-hour restart. FMCSA's Field Survey showed the average weekly (7-day) hours worked by CMV drivers is 61.4 hours.

To reach the maximum driving or driving and on-duty hours requires that nearly perfect logistics for picking up and delivering a load are routinely in place; in other words, total elimination of waiting time to load, mechanical and equipment problems, and traffic- and weather-related delays. Additionally, as explained in this rulemaking, FMCSA and other independent survey data collected since the 2003 rule was adopted indicate that drivers are not, in fact, maximizing their driving hours or total on-duty time, nor do they routinely take the minimum number of off-duty hours. In view of these facts, drivers will not routinely accrue the maximum weekly driving and on-duty hours feared by some commenters.

This is not surprising. As indicated above in section J.5, driving and on-duty hours under the 2003 rule would not be expected to increase suddenly unless there had been an equally sharp spike in demand for trucking services. Although the U.S. economy is expanding, there was no unprecedented eruption of demand for transportation in 2004 and 2005 that might have overwhelmed the normal, measured growth of the motor carrier industry and forced drivers to maximize their work hours in order to handle a huge volume of new cargo. The data FMCSA has collected bear this out. While some drivers may occasionally drive the maximum hours allowed by the 34-hour restart rule, most will continue to work about the same number of hours they did before the 2003 rule. According to commenters, the great advantage of the restart provision is not the increased work hours it allows, which are not regularly used, but the scheduling flexibility it gives motor carriers and the added time at home it gives drivers.

Operational Data

As mentioned earlier, the 2005 FMCSA Field Survey (see Section I.1) shows that between July 2004 and January 2005, 393 drivers used 1,411 recovery periods. The survey found that 95 percent of recovery periods exceeded 34 hours in duration. Figure 8 shows that 50 percent of the recovery periods were longer than 58 hours, in contrast to 5 percent that were only 34 hours long. The data appear to confirm that, in fact, a majority of drivers are obtaining two midnight to 6 a.m. sleep periods.

2004 FARS data suggest that fatigue-related crashes, as a percent of all fatal truck crashes, have decreased under the 2003 rule. Similarly, carriers commenting on the 2005 NPRM generally cite either stable or decreasing crash rates (see Section H-Crash Data). FMCSA agrees with many commenters that the limited data available does not provide a definitive picture of the impact the 2003 rulemaking has had on fatigue-related CMV crashes. However, the preliminary data reported and reviewed to date does suggest that fatigue related crashes have decreased as a result of the 2003 rulemaking.

Economic Impact of the Rule

The safety and health effects of modifying or eliminating the recovery provision need to be weighed against the significant economic costs that would be incurred by the transportation industry. As discussed in detail in the RIA accompanying this rule, increasing the restart period to 44 hours would result in an extremely high cost relative to benefits. Specifically, the annual costs to implement a 44-hour recovery period were estimated at approximately $600 million. The cost to eliminate the 34-hour recovery provision in isolation, or with no other HOS-related changes implemented, was even higher, with annual costs more than $1.5 billion from productivity losses to motor carriers, while safety benefits were estimated at less than one-tenth the cost. In summary, the cost to modify the recovery provision was estimated to be significant, which is due in part to its extensive use by the industry, as discussed in detail throughout this rulemaking.

As discussed further in this section, an analysis of survey data by Campbell and Belzer [Campbell, K.L., & Belzer, M.H. (2000), p.115] found that the average commercial truck driver drives approximately 22 percent of his or her weekly driving time during the midnight to 6:00 a.m. period. While the economic impacts of restricting driving during the midnight to 6:00 a.m. period were not explicitly measured as part of this rulemaking, such a restriction would undoubtedly result in significant economic impacts to the motor carrier industry, given that 22 percent of current driving time would have to be

shifted to the remaining 18 hours of the workday, or that period in which most highway congestion already occurs. These impacts would come in the form of both reduced safety benefits as well as new operational costs to carriers. Numerous comments submitted to the docket in response to the 2000 HOS NPRM spoke to this point. For instance, comments submitted by the National Private Truck Council, American Trucking Associations, Watkins-Shepard Trucking, the National Association of Small Trucking Companies, and many others, noted that restrictions placed on nighttime driving would force trucking companies to place more of their trucks on public roadways during the already congested daytime hours. Additionally, some carriers would have to purchase additional trucks that would be required to operate during the daytime period, in those instances where a single truck was previously utilized by two drivers operating on separate day and night schedules. As a result, all of these trucks would be operating at a portion of the day when traffic congestion is the worst, resulting in an increase in truck-related crashes and thereby offsetting any potential safety benefits resulting from a reduction in fatigue-related truck crashes from nighttime driving restrictions. Such a restriction would also impose major operational costs to those segments of the industry that use nighttime runs to support daytime operations. For instance, a sizeable portion of the driving done during the nighttime period is performed by line-haul drivers of LTL companies, which haul freight between terminals during the midnight to 6 a.m. period in preparation for local delivery services the following day.

Review of the Literature Regarding Recovery and Fatigue

FMCSA is convinced that the combined impact of today's rule, including the 34-hour recovery period, increases the safety to CMV drivers and is not deleterious to their health. Other provisions of this rule restrict the total on-duty time to 14 hours that cannot be extended by breaks, require drivers to take 10 consecutive hours off duty before beginning a new duty period, and eliminate the split sleeper-berth provision, by requiring that drivers utilize one sleeper-berth period of at least 8 hours. These provisions limit duty time, while affording ample time for drivers to obtain the 7 to 8 hours of sleep that the majority of the research indicates is sufficient to restore a driver to full alertness on a daily basis (see Combined Effects discussion, section J.11).

FMCSA believes the 34-hour recovery period serves as an additional safety benefit that affords a majority of drivers two nights of sleep recovery, which should sufficiently enable drivers to eliminate or ''zero out'' any cumulative fatigue that may occur over several days. While some research suggests that a 24-hour period is sufficient to reduce cumulative fatigue [Bonnet, M.H. (1994), p. 62], most research agrees that optimal recovery occurs when there are two consecutive 8-hour sleep periods from midnight to 6 a.m. [Dinges, D.F., *et al.* (1997), p. 276; Rosekind, M.R. *et al.* (1997), p. 7.3]. Under the 34-hour recovery period, 78 percent of the drivers will be able to obtain two consecutive nights of sleep, and those whose schedules do not permit night sleep will at least be provided with two 8-hour sleep periods and some schedule regularity. However, as stated by FMCSA's 2000 NPRM expert panel, ''If the work shift ends late in the evening, *e.g.*, 11:30 p.m., it is conceivable that the driver could be in bed by midnight if there is an adequate place to sleep nearby. Under these circumstances the total recovery time period could be as short as 31 or 32 hours and still allow for two uninterrupted time periods between midnight and 6:00 a.m.''

Additionally, nighttime drivers will be less fatigued on a daily and weekly basis, compared to the pre-2003 rule, through the combined effects of the provisions of the rule being enacted today (see Combined Effects, section J.11). While the two consecutive 8-hour sleep periods that some night drivers will utilize for sleep are not ideal, today's rule will limit the build-up of cumulative fatigue; hence, the two 8-hour sleep periods give drivers an adequate opportunity to help minimize such acute and cumulative fatigue, regardless of their driving schedule.

FMCSA has determined that, in general, recovery time periods must take into consideration the necessity for overcoming cumulative fatigue caused by sleep debt. [Dinges, D.F., *et al.* (1997), p. 267; Balkin, T., *et al.* (2000), p. ES–8; Belenky, G., *et al.* (2003), p. 11; Van Dongen, H.P.A, *et al.* (2003), p. 125] Fatigue resulting from sleep loss is usually characterized as acute, resulting from a single insufficient sleep period, or cumulative, resulting from two or more insufficient sleep periods [Rosekind, M.R., *et al.* (1997), p. 7.2]. Rosekind describes three types of sleep loss: ''Sleep loss can occur either totally or as a partial loss. Total sleep loss involves a completely missed sleep opportunity and continuous wakefulness for about 24 hours or longer. Partial sleep loss occurs when sleep is obtained within a 24-hour period but in an amount that is reduced from the physiologically required amount or habitual total. Sleep loss also can accumulate over time into what is often referred to as ''sleep debt.'' Sleep loss, whether total or partial, acute or cumulative, results in significantly degraded performance, alertness and mood'' [*Id.*].

Under today's rule, most drivers have an adequate opportunity to limit the accumulation of fatigue. Ten hours off duty gives drivers enough time for 7–8 hours of sleep. In addition, adopting a non-extendable 14-hour duty tour (reduced by one or more hours from the pre-2003 rule) will also limit the accumulation of fatigue. The off-duty and duty-tour provisions collectively help ensure that drivers can maintain a 24-hour cycle. Comments also support the notion that the restart helps drivers stay on a 24-hour circadian cycle. In addition, today's rule moves drivers from an 18-to 21-hour driving time/off-duty cycle, which is far closer to a 24-cycle than previous rules achieved, thereby reducing the severity of a backward rotating schedule, resulting in less driver fatigue. Further, the revised sleeper-berth requirement provided by this rulemaking also gives drivers the opportunity to obtain 7–8 hours sleep. These provisions, together with the 34-hour recovery period, are more than adequate to allow drivers to return to baseline alertness levels.

This provision protects a majority of drivers because 78 percent of driving time occurs between 6 a.m. and midnight [Campbell, K.L., & Belzer, M.H. (2000), p. 115]. Specifically, the 10 hours off duty coupled with the reduced, non-extendable 14-hour duty tour will provide drivers the opportunity for sufficient recuperative rest on a daily basis to drive and work the daily maximum limits allowed by today's rule. Therefore, the recovery period serves as an added safety net to protect drivers from instances when cumulative fatigue does occur over a 7- or 8-day period.

Research concerning specific recovery periods is limited. Most sleep researchers agree the ideal recovery time for cumulative sleep loss would be an opportunity to obtain sleep during two uninterrupted periods from midnight to 6 a.m. [Belenky, G., *et al.* (1998), p. 13; Bonnet, M.H. (1994), p. 62].

The 2003 rule treats daytime and nighttime driving equally, both in terms of hours permitted and required recovery time. While it is recognized that daytime sleep obtained by night

drivers is not equivalent in quality to night sleep [Akerstedt, T. (1997), p. 105] research concerning specific recovery requirements, particularly for night drivers, is limited. Working/driving during the night, especially midnight to 6 a.m., has the combined effect of affording poorer quality sleep (daytime sleep) and requiring the driver to work and drive during the time when the physiological drive for sleep is strongest. In preparation for the 2000 NPRM, FHWA convened a panel of experts to advise the Agency on science associated with various aspects of the proposed hours of service regulation.

With respect to night driving, the Expert Panel, after reviewing the relevant literature, came to the conclusion that accident risk is substantially higher during nighttime hours, independent of the length of time on the job, and this elevated risk cannot be ignored. The expert panel also determined that driving between the hours of midnight and 6:00 a.m. is associated with as much as a 4-fold or more increase in fatigue-related crashes, because our body clock is ''set'' to wake us up in the morning and to send us to sleep at night. The panel concluded that even when adequate sleep time is available during the day, the time actually spent sleeping is less than at night. Shift work and night work are associated with acquisition of less sleep, even when night work is permanent. The panel surmised that this is caused by disrupting effects of circadian cycles and that sleep obtained is not only reduced in length, but also poorer in quality.

The science supports the notion that drivers should be provided recovery periods after a sustained period of daily work to compensate for any build-up of cumulative fatigue or sleep deprivation [Belenky, G., *et al.* (1998), p. 12]. There is, however, no scientific basis for concluding that every driver, or even every nighttime driver, is sleep deprived. As mentioned, FMCSA has determined that the 34-hour recovery period gives the majority of drivers the opportunity to obtain two uninterrupted nights of 8 hours of recovery sleep.

However, other sleep researchers indicate that recovery to baseline performance levels can be achieved with as little as 24 hours recovery time [Alluisi, E.A. (1972), p. 199; Feyer, A.M., *et al.* (1997), pp. 541–553; O'Neill, T.R., *et al.* (1999), p. 2]. Smiley and Heslegrave [Smiley, A., & Heslegrave, R. (1997), p. 8], in their literature review regarding 36-hour recovery, identified a study that suggests one day off is insufficient for night workers to pay off the accumulated sleep debt from 5 days of work.

IIHS and Elisa Braver cited Park *et al.* (2005), as a study that purportedly showed that 34-hour restart is an insufficient period for recovery. The Park study is an analysis of pre-existing crash and non-crash data representing an estimated 16 million vehicle miles of travel. The study reported, in part, that there is some evidence, although not persuasive, that there may be risk increases associated with significant off-duty time, in some cases in the range of 24–48 hours. The study suggests that ''restart'' programs should be approached with caution. Two sets of models were estimated with the data. Model 1 was developed to assess the effect of driving time which is divided into 10, one-hour periods with the first hour serving as the baseline. The second model retained driving time and added as covariates 43 driving schedules manually derived and developed by cluster analysis. The most significant deficiency in the study was that there were a number of HOS rule changes in 2003 that make the data not applicable. First, the off-duty time has increased from 8 to 10 hours and the on-duty time went from 15 plus hours per day to only 14 hours per day. Both of these changes were intended to reduce any cumulative fatigue that might result. Second, the study and particularly the models used could have been significantly improved if the study had undergone a peer review process. Lastly, the authors concluded that ''there is some evidence, although it is far from persuasive, that there may be risk increases associated with significant off-duty time, in some cases in the range of 24–48 hours'' [Park, S–W., *et al.* (2005), p. 16]. The Agency has examined the study, and like its authors, has concluded that the findings are not persuasive that a shorter recovery period presents greater risk to CMV safety.

Additionally, IIHS cited the Wylie [Wylie, C.D., *et al.* (1997)] study as stating that 36-hour recovery was an insufficient period to ''zero out'' any cumulative fatigue. This study was also based on the pre-2003 rule—drivers operating under the new rule should be less susceptible to cumulative fatigue. The Wylie study was a small demonstration study of a methodology that could be used to evaluate drivers' recovery periods. Twenty-five drivers in small groups (4–5 drivers each) were used to evaluate different recovery periods (12, 36, and 48 hours) and driving time. None of the recovery periods examined were found to be of sufficient length for driver recovery. The study concluded that the small subject sample limited the ability to make reliable estimates of observed effects [Wylie, C.D. (1997), p. 27]. Given the authors' conclusion, the Agency has not relied upon the Wylie study to evaluate the adequacy of the 34-hour recovery period.

As explained earlier, few studies address the effect of recovery periods between work periods spanning multiple days, such as a workweek [O'Neill, T.R., *et al.* (1999), p. 2; Wylie, C.D., *et al.* (1997), p. 27; Smiley, A., & Heslegrave, R. (1997), p. 14]. After reviewing the studies relevant to the 34-hour recovery period, as cited in the 2003 rule and those submitted by commenters to the 2005 NPRM, the Agency has determined that current scientific evidence is limited. Therefore, changes in HOS regulations must, in addition to considering the relevant science and research, be accompanied by sound regulatory evaluation that encompasses all relevant issues, including public interest, cost, and public safety.

The Agency considered implementing a restart period of 44 hours. This would give more drivers, specifically nighttime drivers, an opportunity to be off duty for two nighttime periods between midnight and 6 a.m. However, it would also encourage drivers to operate on a rotating shift, not to mention shifting more drivers to day time, thereby increasing traffic during the day. A forward-rotating schedule would result in a driving schedule that would cause a driver to begin working at a later time of day than the previously used weekly schedule. Therefore, toward the end of each work week, the driver would begin work later and later each day, ultimately shifting the driving and on-duty time into the nighttime hours. Consequently, the added recovery hours would have a negative impact on a driver's circadian cycle.

The Agency attempted to determine whether the added hours of recovery, through the use of a 44-hour recovery period, created a net benefit in reducing fatigue compared to the potential negative impact on circadian rhythm of establishing a rotating schedule. The Agency has determined there is no conclusive scientific data to guide it in determining which factor (recovery time vs. circadian disruption) is more effective in alleviating fatigue. In sum, in deciding to adopt a 34-hour recovery period, the Agency considered that compliance with a 34-hour recovery period results in a CMV driver restarting work at approximately the same time of day as his or her prior shift. The 34-hour recovery period also avoids the shifting of daytime to nighttime schedules,

which research indicates can disturb the circadian rhythm and decrease alertness.

Public Comments

In the 2005 NPRM, the 34-hour recovery period received support from more comment letters than any other provision (591 approved versus 109 disapproved). The commenters said that the 34-hour recovery period makes scheduling much easier than working with the old rolling weekly limits. Comments also indicated that 34 hours off duty are long enough to allow recovery (111 of 130 comment letters that addressed the issue). According to a 2004 survey, among 31 fleets that responded, the 34-hour restart is the most utilized feature of the 2003 rule. The survey, titled ''A Survey of Private Fleets on their Use of Three New ''Hours of Service Features','' conducted by Stephen V. Burks of the University of Minnesota, found that ''most widely used among survey respondents is the 34-hour Restart, which is employed on average of 61 percent of the runs of firms in the sample'' [Burks, S.V. (2004), p. 2]. Additionally, driver surveys have shown time to spend at home and with family was identified as a major priority [Belenky, G., *et al.* (1998), p. 41].

Public Safety and Operational Concerns

As mentioned earlier in this section, many comments to the 2000 NPRM suggested that by requiring all drivers to take two midnight to 6 a.m. recovery periods, FMCSA would be increasing the number of heavy vehicles operating in daytime traffic. The commenters stated that this would create greater hazards to public safety. While ideally all CMV drivers can benefit from obtaining two nights of sleep, FMCSA continues to believe, as stated in the 2003 rule (68 FR 22477), that restricting nighttime driving by mandating a midnight to 6 a.m. off-duty period for all CMV drivers would have the unintended consequence of substantially increasing the number of heavy vehicles in daytime traffic, creating greater hazards for the average motorist simply because of the higher density of vehicles.

The Agency also took into consideration that not all motor carrier operations work on a ''fixed and recurring 7-day period,'' instead having intense days of work followed by slack times, and that other operations can be disrupted by weather. For example, one commenter discussed how weather affects the logging transportation industry. The commenter explained that a CMV driver might begin the workweek on Monday, fully rested and work a full 14-hour day, which is interrupted by a full day of rain (Tuesday). The commenter explained the 34-hour recovery period allows the CMV driver to resume work on Wednesday and be able to work in compliance with the regulations to accomplish the work required during that work week. The Agency has decided the 34-hour recovery gives motor carriers and drivers the option of restorative rest during the times work is not available or is interrupted. Given that the recovery provision can be taken at any time, it is a flexible safety tool that can be used by drivers as an added restorative safety measure.

Health

The 34-hour recovery provision has turned out to be one of the most popular provisions of the 2003 rule among CMV drivers. Several carriers indicated they now see drivers proactively scheduling extended off-duty recovery periods into their workweek and returning after these extended periods with ''positive attitudes and appearing rejuvenated,'' which promotes improved driver health.

FMCSA examined the effect of the new rule on driver work hours by comparing survey data obtained before and after the 2003 rule was implemented. A detailed discussion of those results along with confirming data from multiple carriers can be found in Section E'' Driver Health. These data show that CMV drivers are not working longer hours as a result of the 2003 rule than they did under the pre-2003 rule. In addition, the Field Survey conducted by FMCSA showed that many drivers are taking recovery periods considerably longer than the 34-hour minimum. Fifty percent of the drivers were found to have taken 58-plus hours of recovery time per week and 67 percent of drivers took 44 hours recovery time per week, as explained in Section I.1.

One of the reasons that the 34-hour recovery rule is so popular among drivers is that it appears to provide for longer blocks of consecutive hours away from work than the pre-2003 rule provided ''to rest, to be with family, and to recover prior to the start of the next work week. In a survey of its membership, OOIDA asked ''Do you get more time at home under the new HOS regulation?'' Twenty percent of OOIDA drivers responded ''yes''—that they were getting more time at home as a result of the 2003 rule. A slightly higher percent (21 percent) of long haul drivers responded that they were getting more time at home compared to short-haul drivers (18 percent). The survey question's wording did not allow for an examination of how many drivers may be spending less time at home as a result of the 34-hour recovery. It appears that for some drivers the 34-hour recovery period may allow more time at home and provide for greater stabilization of family life. The impact of these factors is difficult to quantify from a driver health perspective, but an improved quality of life may lead to improved health. Few research studies have been conducted that address this particular issue. (See Combined Effects—Section J.11, for further discussion.)

As explained earlier, the 34-hour recovery period provides the potential opportunity for drivers to increase their weekly driving and on-duty time. The National Institute of Occupational Safety and Health (NIOSH) reviewed the relationship between long hours and worker health. It generally concluded that long work hours are associated with poorer health, increased injury rates, more illnesses, or increased mortality. However, the NIOSH review of the literature on long work hours also documented a significant lack of data on general health effects. NIOSH raised doubts about the strength of its own conclusions, stating that ''research questions remain about the ways overtime and extended work shifts influence health and safety.'' NIOSH did, however, examine three studies that identified the relationship between long shifts, those typically worked by a CMV driver, and health or performance. The results are documented in Section E—Driver Health.

Research indicates that psychological factors do play a role in the health of individuals, including CMV drivers. For example, CMV drivers generally want the freedom to manage their workplace and schedule. Given the shortage of CMV drivers, the ready availability of jobs, and the high level of reported driver turnover, it is unlikely that any one employer could require a driver consistently to work the maximum hourly limits available in the 2003 rule or today's rule—unless a driver chose to do so. In other words, working long hours is an individual choice. A driver has the right to choose to work longer hours to earn greater pay as long as he or she can operate a CMV safely. Survey data presented and discussed earlier, from multiple sources, indicate that contrary to the concerns expressed by some commenters, drivers are, in fact, not driving more under the 2003 rule than they were under the pre-2003 rule. Instead, the 34-hour recovery period is being used in a positive way, i.e., more driver time with family and greater operational flexibility and productivity.

Two studies in the NIOSH review found that compensation has a strong effect on the perceived impact of long working hours. Siu and Donald [Siu, O.L., & Donald, I. (1995), p. 30] and van der Hulst and Geurts [van der Hulst, M., & Geurts, S. (2001), p. 227] suggested that compensation may reduce the adverse effects of long work hours. The Siu and Donald study [p. 48] reported a relationship between perceived health status and overtime pay. Men from Hong Kong who received no payment for overtime work had more health complaints than men who received payment for overtime work hours. In addition, the van der Hulst and Geurts study [p. 227] examined the relationship between reward and long working hours in Dutch postal workers. This study also showed that if workers are compensated, they are able to work longer hours without negative consequences to their psychological health [*Id.*, p. 237].

Few studies have examined how the number of hours worked per week, shift work, shift length, the degree of control over one's work schedule, compensation for overtime, and other characteristics of work schedules interact and relate to health and safety [Caruso, C.C., *et al.* (2004), p. 30.] Van der Hulst, who also conducted a review of research literature on long work hours, concluded ''that the evidence regarding long work hours and poor health is inconclusive because many of the studies reviewed did not control for potential confounders. Due to the gaps in the current evidence and the methodological shortcomings of the studies in the review, further research is needed'' [van der Hulst, M. (2003), p. 171].

There is no conclusive research showing that long hours alone are associated with poor health, especially when taking into account individual choice, compensation, and degree of control over one's work schedule. Also, given the results of FMCSA's 2005 survey of driver hours, it is unlikely that the current HOS rules increase the overall number of hours a driver actually works. In short, given current knowledge, there is no clear evidence that the work hours allowed by today's rule will have any impact on driver health.

Limits on the Use of the 34-Hour Restart Period

During the implementation of the 2003 final rule, several enforcement issues were identified and subsequently addressed through an Agency policy directive dated November 25, 2003. The policy memo provides guidance to roadside law enforcement officials on how to implement the 34-hour restart provision, when drivers have exceeded the 60/70 hour rule. Regulatory officials, motor carriers and CMV drivers complained that the interpretive guidance provided by FMCSA was not consistent with the wording of the regulation.

After reviewing the comments and considering all enforcement remedies available to Federal and State regulatory agencies, FMCSA has decided that if a driver has exceeded the 60/70-hour rule, the driver does not have to come into compliance with the 60/70-rule before utilizing the 34-hour recovery period. However, the driver could be subject to appropriate penalty provision as provided by 49 CFR Part 386 for violating the provisions of 49 CFR 395.3(b). FMCSA is considering additional enforcement remedies in its EOBR rulemaking for both motor carriers and CMV drivers that violate the provisions of 49 CFR 395.3(b).

Questions also arose concerning the appropriate amount of time a driver must be placed Out-Of-Service (OOS) prior to being allowed to drive again for exceeding the 60/70-hour rule in 7/8 days. The length of an OOS period required to bring a driver back into compliance is currently determined based on the number of hours the driver is in excess of the rule. The Agency did change this practice with the implementation of the 2003 final rule.

In this rulemaking FMCSA has decided the driver should be placed OOS for the minimum amount of time necessary to bring the driver into compliance with the provisions of § 395.3(b), or be allowed to take a 34-hour recovery period, whichever is less. As explained earlier in this preamble, a 34-hour recovery period will allow a driver ample opportunity to obtain sufficient rest, even if the driver has exceeded the 60 or 70 hour limits.

Conclusion

In adopting a 34-hour recovery period, FMCSA has taken into account the weekly accumulation of driving and on-duty time allowed during each 7- and 8-day period, the adequacy of the 34-hour recovery, the cost/benefit ratio, the overwhelming support of the 34-hour recovery by the transportation industry, including motor carriers and drivers, the long-term effect on driver health, and the overall safety aspects of retaining this provision.

FMCSA is charged with creating minimum safety standards for CMV drivers under the Motor Carrier Safety Act of 1984 [49 U.S.C. 31136(a)]. The Agency is also required to consider the economic costs and benefits that the rule would impose on the trucking industry and the public [49 U.S.C. 31136(c)(2)(A) and 49 U.S.C. 31502(d)]. As a regulatory Agency, FMCSA must sift through general, and often conflicting, scientific data and attempt to apply it ''in the real world.''

When considering previous studies cited in the 2003 rule in support of the 34-hour recovery period and subsequent studies cited in comments to the 2005 NPRM, the Agency determined that, in light of the scientific evidence, FMCSA's best judgment is that 34 hours provides a minimum amount of time for a majority of drivers to recover from any cumulative fatigue that might occur during any multi-day duty period.

J. 9. Sleeper-Berth Use

Under the 2003 rule, drivers are permitted to accumulate the minimum off-duty period of ten consecutive hours four separate ways: (1) A minimum of 10 consecutive hours off duty; (2) A minimum of 10 consecutive hours in a sleeper berth; (3) By combining consecutive hours in the sleeper berth and off-duty time that total 10 hours; or (4) By combining two separate sleeper berth rest periods totaling at least 10 hours, provided that neither period is less than 2 hours (split sleeper berth exception).

Although FMCSA has found that drivers need 10 consecutive hours of off-duty time to obtain the necessary 7 to 8 hours of restorative sleep per day, the split sleeper berth exception in the 2003 rule allows a driver to accumulate his or her sleep in two separate periods that totaled at least 10 hours.

Splitting sleep into short periods is a concern. One study, ''The Effects of Sleep Deprivation on Performance During Continuous Combat Operations'' [Belenky, G., *et al.* (1994), p. 129)], found that ''Brief fragmented sleep has little recuperative value and is similar to total sleep deprivation in its effects on performance.'' While this study was conducted on soldiers attempting to sleep in busy, noisy command centers, it may still be relevant in some cases when discussing sleeper berth rest, depending upon the environment in which the vehicle is parked and the physical condition of the sleeper berth or truck-tractor cab.

Sleeping in a sleeper berth has been studied as it relates to truck fatalities. A study by the Insurance Institute for Highway Safety [Hertz, R.P. (1988), p. 7] found that splitting sleep into two sleeper berth periods without having 8 consecutive hours in the sleeper berth ''increased the risk of fatality over twofold.'' Hertz also found that split

sleeper berth use increased fatality risk ''in all analyses except those limited to urban crashes and local pick-up and delivery crashes.'' [*Id.*, p. 9]

In a 1996 safety study, the NTSB found that the duration of the most recent sleep period in the 24 hours prior was the most important factor for predicting a fatigue-related crash [*Id.*, p. 51]. The NTSB also noted that the hours of service regulations at the time (8 hours off-duty) did ''not provide the opportunity to obtain an adequate amount of sleep'' and recommended that the use of split sleeper berth time be eliminated [*Id.*]

FMCSA has determined that the available science and literature do not support the continued use of the current split sleeper berth provision. Surveys indicate that only a small percentage of drivers split their sleeper berth time to obtain the necessary off-duty time. An OOIDA survey conducted in 2004 indicates that their members use a split sleeper berth 13 percent of available workdays each month. A survey of private motor carriers [Burks, S.V. (2004), pp. 3–4] indicates that split sleeper berth use in the private fleets is on average about twice as high as the OOIDA number. However, Burks pointed out that of the private firms that use sleeper berths ''half the sample utilizes the [split] [s]leeper berth 2% of the time or less'' [*Id.*, p. 3].

The split sleeper berth exception is also problematic from a driver health standpoint. There is a growing body of research demonstrating that sleep periods of 4 hours, or less, can result in a number of adverse physiologic medical symptoms or conditions that result from having a specific disease, including reduced glucose tolerance, increased blood pressure, activation of the sympathetic nervous system, reduced leptin levels, and increased inflammatory markers [Alvarez, G.G., & Ayas, N.T. (2004), p. 59]. Consistent with these studies, epidemiologic research demonstrates that short sleep duration is modestly associated with symptomatic diabetes, cardiovascular disease, and mortality [*Id.*]. Given the uncertainty with regard to combining two sleep periods these studies suggest that drivers need one period of sleep that is between 7 to 8 consecutive hours daily in order to maintain a healthy lifestyle.

Comments

Approval of the Split Sleeper-Berth Exception. The FMCSA asked commenters to address the fundamental question of whether the Agency should eliminate the split sleeper-berth exception and require drivers to take 10 consecutive hours off duty (either in a sleeper berth or in combination with off-duty time).

A total of 130 commenters expressed general approval of the split sleeper-berth provision. Of these, four were trucking associations (ATA, OOIDA, Associated Petroleum Carriers, and Corporate Transportation Coalition), 42 were carriers, 80 were drivers, and four were private citizens. Commenters stated that the provision allowed drivers to take naps when needed, and to avoid traffic congestion.

Maverick Transportation, C.R. England, OOIDA, and Werner stated that the split sleeper-berth exception is the only way a driver can take a needed nap without being penalized. Werner noted that over 80 percent of its drivers use the sleeper berth on a regular basis. C.R. England described a study of split sleeping time which indicates that total sleep time per 24 hours is the most important determinant of performance, and that sleep can be split into an anchor period of at least 6 hours sleep and another period of 2 hours with a combined effect roughly equivalent to the performance and alertness that is obtained from a continuous 8 hour sleep period. The commenters concluded that the sleeper berth, when used properly, did not reduce drivers' ability to obtain adequate restorative sleep.

Disapproval of the Split Sleeper-Berth Exception. Almost as many commenters (a total of 112), however, expressed general disapproval of the split sleeper-berth exception. These included AHAS, Public Citizen, 18 carriers, 86 drivers, the Georgia Department of Motor Vehicle Safety, and four others. The reasons for disapproval varied. Several commenters noted that the rule was an invitation for cheating, while others stated that split sleeper berth periods do not provide enough rest.

Public Citizen strongly opposed the split sleeper-berth provision and stated that the exception allowed solo drivers to divide their rest time any way they wanted, despite FMCSA's repeated findings that drivers need 8 hours of uninterrupted sleep. They noted that the increase in minimum off-duty time in the current HOS rule from 8 to 10 hours was based on FMCSA's assertion that a driver with only 8 hours of off-duty time generally obtained only 5 hours of sleep, and cited FMCSA's statements that studies point specifically to increased crash risk after fewer than nine hours of off-duty time. They noted that FMCSA has acknowledged that research from all transportation modes suggested a need for off-duty periods of 10 to 16 hours to ensure the needed block of sleep. They stated that studies are unanimous that drivers get both less sleep and lower quality sleep when it is taken in two separate sleeper-berth or other rest periods. Public Citizen cited a study suggesting drivers usually got no sleep during logged sleeper-berth periods.

Public Citizen noted that a 1997 OOIDA study showed that nearly 75 percent of drivers took their off-duty time in a single block. The study showed that those who split their sleeper-berth breaks on average took two 4-hour breaks. Public Citizen recommended that solo drivers should take at least 10 consecutive hours off in a single block of time, regardless of where the time was spent.

The Minnesota Trucking Association recommended that the split sleeper-berth option be changed to reduce the minimum time block to 1 hour, and to allow up to three periods for the calculation of the total split sleeper-berth time.

Minimum Necessary Length of Split-Sleeper-berth Periods. The Agency requested information on the minimum time in each of two split-sleeper-berth periods necessary to provide restorative sleep. Figure 9 provides the breakdown of responses to FMCSA's question on minimum sleeper-berth periods.

FIGURE 9.—COMMENTERS: SUGGESTED MINIMUM SLEEPER BERTH PERIOD

Minimum time	Carriers	Drivers	Other
<2 hours	11	30	1
2–3 hours	3	11	
3–4 hours	2	2	
4–5 hours	5	7	1
5–6 hours	.....	6	
6–7 hours	.....	1	
7–8 hours	1	4	1 (NTSB)

Alertness Solutions reported research showing that obtaining 2 hours less sleep than needed (for an average adult this equates to about 6 hours of sleep) produces a reduction in performance and alertness. The data showed that obtaining a total of 8 hours of sleep per 24-hour period is critical. However, sleep can be split into an ''anchor period'' of at least 6 hours of sleep and a period of 2 hours of sleep at another time with a combined effect of performance and alertness that is roughly equivalent to that obtained from a continuous 8 hour sleep period. Rosekind of Alertness Solutions concluded that translating these scientific results into operational practice would suggest that an ''anchor sleep opportunity'' of 6.5 hours and another sleep opportunity of 2 hours would likely provide the minimum

number of sleep hours needed to maintain a performance level equivalent to one 8-hour sleep period. He said no data indicate whether the order of the two split sleep periods would have a significant effect. He also noted that a sleeper berth provides significant flexibility and proximity that should be regarded when determining the role and opportunity for the use of split sleep. Although there could obviously be a variety of combinations that might be considered for split sleep, Rosekind concluded that two factors are critical. First, at least one sleep period should provide sufficient opportunity for a minimum of 6 hours of sleep. Second, the combined total sleep obtained in the split sleep periods should approximate 8 hours. AHAS, however, criticized Rosekind for ignoring contradictory research that the split sleeper berth periods do not provide sufficient rest and performance restoration.

Several carriers reported on the sleeper-berth patterns of their drivers. Yellow Roadway reported that 70 percent of its team drivers split their sleeper-berth time into two 5-hour periods. C.R. England said its teams split 5 and 5 or 6 and 4; its solo drivers usually split 6 and 4 or 7 and 3. Overnite reported that its teams split 5 and 5, explaining that this pattern means that a driver never drives more than 5 hours at a time. Brink Farms and a driver also supported a 5-hour minimum. Schneider said it limits solo drivers to 8 and 2 only and believes the foundation period for solo drivers should be 8 hours. Schneider provides its team drivers more flexibility.

Some carriers suggested mandatory split sleeper periods. Schneider recommended that the total off-duty time be 9 hours, with an 8 and 1 split, citing a study that advised strategic naps of no more than 45 minutes. FedEx cited a study that showed that two periods totaling 7.4 hours resulted in performance equal to that obtained from a single 8.2 hour sleep period. J.B. Hunt also cited the same study to argue for an anchor period of 6 hours, which could be combined with another 2 hours of sleep and 2 hours off duty.

Most trucking associations endorsed a 5 and 5 split. ATA stated that 5 and 5 has worked for team drivers and recommended continuation of the 2003 rule. The Motor Freight Carriers Association (MFCA) also supported 5 and 5 splits, and stated that company crash data indicate that this does not result in an unsafe operating environment. MFCA stated that a rule change that reduced team flexibility could have a negative impact on driver safety, but provided no supporting data for the assertion.

The California Highway Patrol (CHP) stated that the minimum sleeper-berth period should be at least 5 hours; periods of less than 5 hours should count against the 14-hour day. CHP also asked that ''qualifying sleeper-berth period'' be defined.

The NTSB essentially rejected the split sleeper-berth option, arguing that FMCSA should eliminate any provision that provides for a daily sleep period of less than 8 continuous hours. The current split exception allows for less than 8 hours of sleep in conditions that are not optimal for sleeping, it said.

Impact of Increasing Minimum Split Time for Longer Periods. FMCSA asked what the impact would be on driver health, the safe operation of CMVs, and economic factors, if the Agency were to retain the split-sleeper-berth provision, but require that one of the two periods be at least 7, 8, or 9 hours in length. Four carriers, the California Highway Patrol, and 25 drivers responded to this question. Eight commenters (seven drivers and a carrier) stated that a single break of 7 hours would be sufficient and no additional sleeper-berth period would be needed. Seven commenters (six drivers and McLane Company) supported 7 hours plus another break, not necessarily in the berth. Four drivers and McLane also argued that everyone is different and a single rule is not appropriate.

The California Highway Patrol stated that requiring 7, 8, or 9 hours as a minimum for one of two qualifying sleeper-berth periods would allow a driver to rest only 1, 2, or 3 hours (during the second period) and then drive for an extended period of time. This might also lead to disruption of the 24-hour cycle upon which the regulations are based. Brink Farms argued that, for teams, an 8 and 2 split would do more harm than good and supported a 5 and 5 split for teams. It also supported allowing the second period to be out of the berth.

Yellow Roadway did not agree that 7 or more hours in the berth are the equivalent of 10 hours off duty. The 10-hour period gives a driver a chance for sleep and other personal time. A split with less than a 10-hour total would put the driver in a drive-sleep-drive-sleep position that adds fatigue and diminishes ability.

McLane supported a combination of sleeper-berth and off-duty time because few people sleep for 10 hours. FedEx Ground said the single 10-hour period is rarely used; 2 and 8 and 3 and 7 are also rarely used. Their drivers normally split 5 and 5 or 6 and 4. FedEx stated that it had no evidence that the current rule has had negative effects on fatigue or health and did not support requiring a single 10-hour sleeper-berth period.

Frequency of Sleeper-Berth Use. In the NPRM, the Agency requested information about how often split sleeper-berth periods are used to obtain the required 10 or more hours of off-duty time. Sixty-five commenters responded. Thirty commenters, including 7 carriers, 2 owner/operators, and 21 drivers, said they only rarely or never used the split sleeper berth option. Thirty-one commenters, including 27 drivers, said they used it often.

Among the carriers, B.R. Williams Trucking stated that less than 10 percent of its drivers use the exception. The reason the drivers give is that it is too confusing. Tennessee Commercial Warehouse discourages its contractors from using the exception, although about a quarter do. J.B. Hunt stated that a survey of randomly selected over-the-road driver logs showed that 14 percent of the time drivers use the exception. Schneider stated that only 0.4 percent of its drivers used the exception routinely. International Paper cited research presented at a Transportation Research Board conference in January 2005 indicating that 26 percent of drivers use the exception.

OOIDA noted that the exception is the least used feature of the 2003 rule among respondents to its survey. About 55 percent of drivers reported never using it, and 75 percent of drivers used it from zero to four times in June 2004.

In contrast, Maverick stated that 70 percent of its drivers use the exception. The Georgia Department of Motor Vehicle Safety stated that its inspections and observations indicate that use of the exception is very common.

Health and Safety Impacts of Eliminating the Sleeper-Berth Exception. Four carriers, ATA, 22 drivers, and OOIDA commented on the health and safety impacts of eliminating the exception. Eighteen drivers stated that eliminating the exception would force drivers to drive when tired.

Although OOIDA noted that the split sleeper berth exception is the least used feature of the 2003 rule, it is ''appreciated'' by those who use it. They include drivers who need to rest, but otherwise face pressure not to take short breaks that decrease their available on-duty and driving time. It is the only flexibility in the rule available to drivers who absolutely need to rest. The sleeper berth also serves drivers whose runs are of a certain length or whose pick-up or drop-off times are arranged in a way that permits a continuous two-hour break.

Team drivers also find the sleeper-berth exception useful.

Yellow Roadway stated that the exception gives drivers flexibility to divide driving time and take breaks when needed and where they choose. Reducing team drivers' control of their work and rest opportunities could have a negative impact on driver health, safety, and business operations.

Economic Impact of Eliminating Split Sleeper-Berth Exception. Five drivers and five carriers commented on this issue. Schneider stated that only six percent of teams use the exception with any regularity. However, elimination of this option within Schneider's teaming operations would impact the organization by jeopardizing $250 million in business opportunities with customers requesting team service.

Werner stated customer scheduling and delivery requirements are such that regular hours are impossible. In addition to the limited availability of motels with truck parking, there is a significant cost to drivers staying in motels and the inconvenience factor of maneuvering a large truck through urban or suburban areas to locate a motel. If the sleeper berth exception were not available, there would likely be a further increase in the truck parking problem, congestion, and driver turnover.

McLane stated that elimination of the exception would virtually eliminate use of sleeper-berth by all but cross-country long-haul drivers. McLane's operating costs would significantly increase, due to the need to hire additional drivers and equipment, while the overall earnings for existing drivers would be reduced.

Quality Transport stated that eliminating the sleeper berth exception would largely defeat the purpose of team driving. If the teams cannot use the sleeper-berth rule, then they have no option but to show on-duty time for any time spent not driving. This would be a huge economic loss to companies using team operations, as it would basically do away with the benefit of running as a team. The loss would affect income for teams, plus income for the company they are leased to or drive for. It would affect the current national market by curbing deliverability of many products.

A driver also believed that the effect of eliminating the exception would be to eliminate team operations. One driver said he would have to stop driving over-the-road. Three stated that it would affect drivers who use it to avoid traffic and shipper delays. One carrier simply stated that it would decrease efficiency.

However, another driver saw a positive effect in eliminating an opportunity for shippers, carriers, and receivers to use the exception to pressure drivers to extend their work day. One said it would not change anything, but would eliminate a lot of logbook fines.

Impact of Not Allowing a Single Sleeper-Berth Period to Extend the Duty Period. FMCSA asked commenters to provide information about how prohibiting the extension of the 14-hour tour of duty through the use of a single sleeper-berth period affects driver health, safe operations, and economic factors.

Numerous commenters addressed this issue. Nineteen drivers, two carriers, a consulting group, OOIDA, and the California Highway Patrol responded to the question about the health and safety impacts.

The Georgia Department of Motor Vehicle Safety described the problem created by the current rule. An officer who encounters a driver with a single sleeper period in the current tour of duty must either predict the driver's future actions, or question the driver, and make a judgment call about the driver's status.

The California Highway Patrol addressed the negative impact of extending a driver's work day with only one sleeper-berth period, stating that it effectively circumvents the intent of the regulation and changes the driver's 24-hour cycle. It would allow drivers to operate CMVs long after the completion of the intended 14-hour work period. The Daecher Consulting Group also noted that allowing the extension would permit a slippage or rotation of the duty day.

OOIDA described the requirement that both periods be in the sleeper berth, even if the driver is at home, as ''absurd.'' They stated that there is no justification for the requirement and are not aware of any study that indicates that sleeping in a sleeper berth is better than a bed. OOIDA recommended that the driver be able to replace the second period with 10 hours off. This would allow the driver the flexibility to restart the next day's schedule without having to relate back to the first sleeper period. UPS supported the OOIDA position.

Combining Sleeper-Berth Periods With Off-Duty Periods To Calculate Off-Duty Time. FMCSA asked whether the rule should allow sleeper-berth periods to be combined with off-duty periods when calculating a continuous off-duty period. The Agency also asked whether a sleeper-berth period that is part of a period of 10 or more consecutive hours off duty should be combinable with a later sleeper-berth period as part of a split sleeper-berth calculation.

Support for combining sleeper-berth and off-duty time came from 141 commenters, including ATA, Minnesota Trucking Association, the National Association of Small Trucking Companies, 41 carriers (including UPS, FedEx, J.B. Hunt, Con Way, and Werner) and 94 drivers. Three drivers were opposed.

The California Highway Patrol recommended that a driver who combines a last sleeper-berth period with 10 hours off duty not be penalized for resting at home or be forced to sleep in the truck. However, if sleeper berth and off-duty time are combined, this same sleeper-berth period should not be used in combination with a subsequent sleeper-berth period. CHP recommended definitions of ''qualifying sleeper-berth period'' and ''subsequent sleeper-berth period.''

The Georgia Department of Motor Vehicle Safety stated that a full 10-hour period of sleeper-berth time should not be combinable with a shorter period of time.

ATA submitted an extensive argument in favor of amendments to the split sleeper-berth provisions. ATA used four hypothetical schedules to illustrate its argument, with three of the schedules in compliance with the 2003 rule, and one not in compliance. ATA claimed its hypothetical schedules demonstrated that, despite FMCSA's statement that drivers are free to take naps or other rest breaks, the rule is a strong disincentive to doing so if time in the sleeper berth results in lost work time.

ATA also argued that the rule creates uncertainty for logbook inspectors. Whether an extended work period is legal or illegal depends on the intentions and subsequent actions of the driver, neither of which can be known to the enforcement officer at the time of a logbook check.

Based on its analysis, ATA recommended, and provided an extensive discussion of the benefits of, detailed amendments to 49 CFR 395.1(g)(1)(iii) and 395.3(a)(2) and the addition of a new exception specifying the following:

> A property-carrying driver is exempt from the requirements of § 395.3(a)(2), and may extend the 14-hour limit in the event that the driver has one sleeper-berth period with a minimum duration of 2 hours, provided that the driver does not exceed 14 cumulative hours of work or 11 hours of driving, and that the on-duty time is followed by an off-duty time of at least 10 consecutive hours.

The American Bakers Association stated the inability to combine off-duty

and sleeper-berth time ''must have been an oversight,'' arguing that it made no sense for operators to be tying up equipment on the lot in the sleeper berth when they want to go home and go to bed.

Some carriers supported the ATA position. Others made their own recommendations for changes. UPS proposed permitting drivers to extend the 14-hour on-duty window to account for breaks of at least 2 hours taken in a sleeper berth when they are combined with 10 hours of off-duty time immediately following the shift. UPS also proposed that drivers be permitted to extend the 14-hour on-duty window to account for sleeper-berth periods of at least 2 hours when they are combined with a subsequent sleeper-berth period of any length, if it is immediately followed by at least 10 hours of off-duty time. Both FedEx Ground and Werner recommended strongly that drivers be able to finish their 10 hours at home if they have a previously qualifying sleeper-berth period. J.B. Hunt concurred and recommended that this be allowed for other sleeping accommodations as well. It noted that an FMCSA enforcement bulletin allowed this, but many jurisdictions refused to implement the bulletin because it directly contradicted the plain language of the regulation.

FMCSA Response

Primary Sleep Period. Although the comments to the docket are closely divided over how to address the split sleeper berth exception, the majority of studies and science clearly demonstrate that drivers need to have at least one primary sleep period of 7 to 8 consecutive hours.

A study of chronic sleep restriction [Maislin, G., *et al.* (2001)] showed that it is possible for a person to avoid physiological sleepiness or performance deficits on less than 7 hours of sleep; however, the subjects in the study were obtaining their primary sleep period at night and were supplementing their sleep with longer naps later in the day. Maislin *et al.* found that subjects who slept for 6.2 hours at night combined with a nap of 1.2 hours had lower levels of sleepiness and higher levels of performance, compared to subjects who slept shorter periods without naps. While 6 hours of sleep at night with a nap may be the minimum needed to maintain an adequate performance level, it is unrealistic to think that the Agency can regulate what time of day a driver goes off duty or sleeps in a sleeper berth.

Consequently, today's final rule modifies provisions for the use of sleeper berth time. The Agency will continue to allow drivers to use the sleeper berth to obtain their required off-duty time; however, drivers using this option will be required to obtain one primary sleep period of at least 8 consecutive hours. Unlike drivers who have to commute to and from work and perform personal tasks after going off duty, sleeper-berth drivers do not need 10 consecutive hours off duty in order to have an opportunity for 7–8 consecutive hours of sleep. Because their bedroom travels with them, sleeper-berth drivers can obtain adequate sleep in an 8-hour period. These drivers will also be required to take another separate two consecutive hours of off-duty time, sleeper berth time, or a combination of both. These additional hours will allow time for naps and other breaks, and will prevent drivers from operating on a 19-hour schedule (8 hours in the sleeper berth followed by 11 hours of driving) that would seriously compromise their circadian rhythm.

For example, a driver who takes 9 consecutive hours in the sleeper berth would later have to take at least 2 consecutive hours of sleeper-berth or off-duty time or a combination thereof to meet the minimum requirements. Since the driver did not obtain a single period of 10 consecutive hours of off-duty or sleeper berth time, the driver is required to make up the balance of his or her off-duty or sleeper berth time later in the duty period.

These requirements will ensure that drivers using the sleeper berth to obtain the minimum off-duty time have at least one primary sleep period of a sufficient length to provide restorative benefits. The second period will allow a driver to have time for a nap or rest break or provide an opportunity to attend to personal matters. The opportunity to take a nap later in the day is an important benefit, especially since drivers taking advantage of the sleeper berth provision may be operating on an irregular/rotating schedule, getting out of phase with their natural circadian rhythm.

Overwhelmingly, the research literature supports the need for most people to obtain 7 to 8 hours of sleep per day. A study of driver fatigue [Wylie, C.D., *et al.* (1996), p. ES–10] found that the average amount of ''ideal'' sleep time reported by participating drivers was 7.2 hours. The NTSB [NTSB (1996), p. 26] found that drivers in non-fatigue related crashes had averaged 8 hours of sleep during their last sleep period prior to the crash versus drivers involved in fatigue-related crashes whose prior night sleep averaged only 5.5 hours. A study of soldier performance [Belenky, G.L., *et al.* (1987), p. 1–10] noted that ''the vast majority of adults required 6–8 hours of sleep each night to maintain adequate, normal levels of daytime arousal.'' Belenky *et al.*, further noted that a person getting ''six to eight hours sleep each night will maintain cognitive performance'' [*Id.*, p. 1–17].

Research supports the benefits of sleeping at night, rather than during the day, but the needs of the U.S. economy and the operational realities of the motor carrier industry make it is impossible for FMCSA to ensure that drivers obtain all of their rest during nighttime hours. Given this, and the results of earlier studies that suggest sleep obtained in a sleeper berth is not as restorative as sleep obtained in a bed, today's rule will require drivers using the sleeper berth exception to obtain at least one primary sleep period of 8 consecutive hours in the sleeper berth. This provision maintains some of the flexibility provided by the 2003 rule, and ensures that drivers have the opportunity for 7 to 8 consecutive hours of uninterrupted sleep.

The economic impact of this provision will be the greatest in the long-haul sector of the industry; however, the ''Commercial Motor Vehicle Driver Fatigue, Alertness, and Countermeasures Survey'' [Abrams, C., *et al.* (1997), p. 12] found that the majority of drivers using the split sleeper berth exception already average 6 to 7 hours in the sleeper berth. In addition, the 2005 FMCSA Field Survey data show that of the 2,928 sleeper berth periods reviewed, 68 percent exceeded 6 hours and 52.6 percent exceeded 8 hours, so the overall impact on the industry should be relatively small [FMCSA Field Survey Report (2005), p. 2].

Rest Breaks. The requirement for an additional 2 consecutive hours of off-duty or sleeper-berth time for drivers using the sleeper berth provides a number of additional benefits. It ensures that all drivers (those using a sleeper berth, and those not using a sleeper berth) will have the same amount of time to drive and work every week. It also provides the opportunity for a sleeper berth driver to eat meals, bathe, exercise, and conduct other personal activities. Most importantly, the 2 consecutive hours provide the driver with the opportunity to nap, if and when needed.

Rest breaks, and especially naps, are an important tool in combating fatigue and the FMCSA encourages their use. As noted by Wylie [Wylie, D. (1998), p. 13], ''[n]aps in trips with judged

drowsiness appeared to result in recovery effect, compared to the relatively high levels of drowsiness seen in the hour prior to napping.'' Research on napping indicates that while it does not reduce accumulated fatigue, it does refresh a driver and improves performance in the near term. In another study of military operations [Caldwell, J.A., *et al.* (1997), pp. 2–5] the subjects performed better after napping compared to resting without sleep. In addition to working as a short-term countermeasure to fatigue experienced during working hours, another study [Garbarino, S., *et al.* (2004), p. 1300] found that napping ''before night work can be an effective countermeasure to alertness [deterioration] and performance deterioration.''

The Agency recognizes that drivers who are able to get 7 to 8 hours of sleep per day may not require additional sleep and it would be unreasonable to require the driver to stay in the sleeper berth for an additional two hours. For this reason, the FMCSA will permit drivers to accumulate the additional two hours as sleeper berth time, off-duty time, or a combination of both. Two hours are long enough to permit time for a nap, as well as time to attend to personal matters. Studies have found that naps do not have to be long to improve performance. A study of working at night [Sallinen, M., *et al.* (1997), p. 25] found that naps of less than one hour most influenced performance, and a survey of train engineers found that 20 minute napping was effective for enhancing alertness [Moore-Ede, M., *et al.* (1996), p.10].

Although this provision on the use of sleeper berths does reduce the total flexibility provided in the 2003 rule, it provides motor carriers and drivers with some operational flexibility while ensuring that drivers are afforded the opportunity of at least one 8-hour sleep period each 24 hours, with the additional benefit of providing the option for a nap or break.

Enforcement. The prior split sleeper berth provision caused some confusion in law enforcement and the motor carrier industry. The question has been how to calculate split sleeper berth time, and how split sleeper berth periods affect the calculation of the 14-hour duty ''window.''

The calculation of the driver's 11-hour driving limit and 14-hour duty ''window'' will restart once a driver has at least 10 hours of off-duty time, whether it is (1) 10 consecutive hours of sleeper berth time; (2) 10 consecutive hours of off-duty time; or (3) a combination of 10 consecutive hours of sleeper berth and off-duty time. Drivers using sleeper berths have a fourth option to obtain the equivalent of 10 hours off duty by combining two separate periods of sleeper berth or off-duty time that total at least 10 hours. When calculating off-duty time for drivers using sleeper berths under this rule, only two separate periods may be used and both must add up to at least 10 hours. One period must be at least 8 consecutive hours of sleeper berth time. The second period must be at least 2, but less than 10, consecutive hours of sleeper berth time, off-duty time, or a combination of both.

For drivers using two separate periods of sleeper berth and off-duty time, the calculation of the driver's 11-hour driving limit and 14-hour duty ''window'' will begin from the end of the first period used in the calculation. This will provide a simplified method for calculating a driver's on-duty and driving time and address some of the enforcement concerns received in the comments.

For example, following 10 consecutive hours off-duty, a driver begins driving at 5 a.m. At 10 a.m., the driver takes 2 consecutive hours off-duty (1 hour of off-duty time followed by 1 hour of sleeper berth time). At noon, the driver drives for another 5 hours. At 5 p.m., the driver goes into the sleeper berth for 8 consecutive hours. At 1 a.m. the driver begins driving again. In this example, the calculation of the driver's on-duty and driving time begins at the end of the first off-duty/sleeper berth period, or noon. Therefore, this driver has 5 hours of driving time available at 1 a.m. At no time will a driver have a combination of more than 11 hours of driving time on either side of a sleeper berth period or off-duty period that is less than 10 hours in length.

The driver's 14-hour duty ''window'' is calculated differently from the way it was calculated under the 2003 rule. As identified in a petition filed by ATA on November 3, 2003, and numerous docket comments on this subject, FMCSA will not count any sleeper berth period of at least 8 but less than 10 consecutive hours toward the 14-hour limit after coming on duty. The ATA petition requested that any sleeper berth period of at least two consecutive hours be excluded from the calculation of the 14-hour duty ''window,'' provided that the driver took 10 consecutive hours off-duty either upon reaching his or her 14-hour limit, or 11-hour driving limit. The Agency's response to that request, and the comments provided to the docket, is to allow any sleeper berth period of at least 8 but less than 10 consecutive hours to be excluded from the calculation of the 14-hour duty ''window.'' This will ensure that drivers using a sleeper berth to obtain their minimum off-duty time are not negatively impacted by having to take at least one sleeper berth period of at least 8 consecutive hours, which would normally count against their 14-hour duty ''window,'' leaving the driver with only 6 hours of time to work and drive. Any period of less than 8 consecutive hours in the sleeper berth will count toward calculation of the 14-hour ''driving window.''

In the earlier example, the driver would have reached the 12th hour of his or her 14-hour duty ''window'' at 5 p.m. when he or she went into the sleeper berth for 8 consecutive hours. Because the driver has 10 hours of off-duty time (2 hour break, combined with 8 consecutive hours in the sleeper berth), the calculation of the 14-hour duty ''window'' begins at the end of the 2-hour break (noon). However, when the driver starts driving at 1 a.m., he or she would only be at the 5th hour of his or her 14-hour duty ''window,'' because the 8 consecutive hours in the sleeper berth are excluded from the calculation. The Agency believes that this will simplify the calculation used by enforcement officers during roadside inspections, as well as by drivers as they calculate their daily on-duty and driving limits.

In the Agency's best judgment based on available data and comments, this sleeper berth provision creates an optimal balance by providing drivers with one 8-hour sleep period, combined with an additional sleeper berth or off-duty period, while maintaining operational flexibility so as not to impose an unreasonable burden on motor carrier productivity.

J.10. Regulation of Short-Haul Operations

Motor carriers whose operations require the driver to return to their work-reporting location every night and are conducted solely within a 150 air-mile radius from their terminals are generally considered short-haul operations. Short-haul drivers perform a variety of non-driving tasks during the day, including receiving the day's schedule, loading and unloading the vehicle, making deliveries, getting in and out of the vehicle numerous times, lifting and carrying packages, and engaging in customer relations. Because of the nature of short-haul operations, smaller vehicles (*i.e.*, less than 26,001 pounds) tend to be favored for their maneuverability, which makes them ideal for pick up and delivery in a local, or urban setting.

A review of the U.S. Census Bureau's Vehicle Inventory and Use Survey (VIUS), 2002, shows that trucks weighing 26,000 pounds or less make up about half of all registered trucks and represent about a quarter of all truck miles traveled. Trucks weighing 26,000 pounds or less accounted for only one-seventh of all trucks involved in non-fatal crashes, and only one-tenth of all trucks involved in fatal crashes, according to data found in the Motor Carrier Management Information System (MCMIS) and the Fatality Analysis Reporting System (FARS). Relative to their share of registered trucks and annual truck miles traveled, trucks weighing 26,000 pounds or less are underrepresented in fatal and non-fatal truck-involved crashes.

A study of the Impact of Local/Short Haul Operations on Driver Fatigue by Richard Hanowski and others suggested ''fatigue may not be the most critical issue'' in the safety of short-haul operations [Hanowski, R. J., *et al.* (1998), p. 72]. Short-haul drivers who were asked to describe the safety problems they faced ranked fatigue fifth, below problems as obscure as the design of loading docks and freeway on- and off-ramps. In explaining why short-haul operations did not produce critical levels of fatigue, the drivers said that ''unlike long-haul drivers, [they] typically work during daylight hours, have work breaks that interrupt their driving, end their shift at their home base, and sleep in their own beds at night'' [*Id.*]. Hanowski *et al.* concluded that ''[p]erhaps, when it comes to fatigue, [local/short-haul] drivers are more like workers of non-driving professions where fatigue may not result from their work, as in long-haul, but may be impacted by their personal lives (such as not getting enough sleep at night)'' [*Id.* p. v]. While FMCSA cannot control drivers' off-duty behavior, the 2003 HOS rule and today's final rule give local/short-haul drivers two more hours off duty than the regulations in effect in the late 1990s, when the Hanowski study was completed. If fatigue was not critical at that time, it is even less likely to be a significant threat today. Compared to long-haul drivers, local short-haul drivers have a better opportunity to obtain the daily restorative rest needed to maintain vigilance in an environment that provides quality sleep.

Historically, the Federal Motor Carrier Safety Regulations have recognized differences between long-haul and short-haul operations. FMCSA realizes that short-haul operations are involved in crashes, and sometimes even fatal crashes, as evidenced by the crash data referenced earlier. However, the representation of short-haul vehicles weighing less than 26,001 pounds in large truck crashes is much lower than their share of the total truck population and miles traveled. The regulatory impact analysis (RIA) for the 2003 HOS rule bore this out, and researchers estimated the costs of imposing that rule on short-haul carriers would far exceed any safety benefits resulting from a reduction in fatigue-related crashes. Conversely, the net benefits of imposing those HOS rules on long-haul carriers were quite positive, primarily due to a reduction in fatigue-related crashes by long-haul drivers.

Today's HOS rule adopts two exemptions for short-haul drivers also provided in the 2003 rule, though neither significantly improves the regulatory cost/benefit ratio of short-haul operations. The first is known as the ''100 air-mile exemption,'' and provides relief from a paperwork burden for drivers who meet specific duty time requirements (report to and leave from work within 12 consecutive hours) and operate in a 100 air-mile radius of their work reporting location [49 CFR 395.1(e)]. Because drivers operating within a limited radius commonly make frequent stops, deliveries, and pick-ups throughout the day, which would normally require many entries on their records of duty status (RODS), this provision exempts drivers from completing RODS, as long as the motor carrier maintains a proper daily time record. The Interstate Commerce Commission adopted this provision, as a 50-mile exemption, in 1952.

The second exemption gives drivers the flexibility to extend the 14-hour duty ''window'' by two hours once a week [49 CFR 395.1(o)]. The two extra hours can be used by the driver to meet peak demands, accommodate training, stage trucks for the next day's deliveries, or complete required recordkeeping. This final rule adopts both of these exemptions; however, as discussed later, the ''100 air-mile exemption'' is incorporated into the new regulatory regime provided for short-haul drivers of small CMVs in today's rule. Today's final rule makes no changes to the ''16-hour'' provision found at 49 CFR 395.1(o).

Comments

In response to the discussion of short-haul operations in the 2005 NPRM, the Agency received 18 comments addressing the need for different HOS rules for this class of operation. Specifically, five carriers, four trade associations or firms representing the construction industry, two other trade associations, and seven drivers recommended different rules for short-haul operations.

Associations

The National Ready Mixed Concrete Association (NRMCA), the National Sand, Stone, and Gravel Association (NSSGA), the Colorado Ready Mixed Concrete Association (CRMCA), and an independent supplier of ready-mixed concrete recommended separate rules for short-haul drivers that would recognize they operate under different conditions having varied impacts on driver safety, fatigue, and health. NRMCA stated that the 2003 HOS rule mainly addresses the fatigue problems of long-haul truckers while ignoring the fact that short-haul drivers work within a limited radius, do not spend the majority of their time driving, begin and end their shifts at the same location, and sleep at home every night. A survey conducted by the NRMCA in 2000 indicates that drivers of ready-mixed concrete trucks spend, on average, only 49 percent of their time driving. The NRMCA, supported by the NSSGA and the CRMCA, recommended extending the current 100 air-mile radius to 150 miles, and offering drivers a 16-hour duty window, with no driving allowed after 14 consecutive hours from the start of the duty period.

Construction operations are mainly short-haul in nature, but other commenters argued that the characteristics of their particular industries also require special HOS rules. These other comments focused on drivers transporting farm products or delivering fuel to farms during peak seasons; drivers performing seasonal log hauling in remote areas; pipeline repair truck drivers; propane delivery drivers who make night service calls and respond to emergencies; and drivers of vehicles involved in environmental remediation and emergency response. The American Bakers Association asked that short-haul operators be allowed to retain the once-a-week 16-hour duty-period. Two contractors to the U.S. Postal Service opposed the current 14-hour provision, arguing that unless split-shift time spent at home or in a designated sleeping area qualifies the same as a sleeper-berth, the rule will hurt small companies. These companies would then have to hire more drivers to accommodate the additional off-duty time required, which in turn would put more inexperienced drivers on the road.

The U.S. Chamber of Commerce stated that the FMCSA's 2003 RIA demonstrated that short-haul operators were not expected to see any benefits from the rule adopted that year, which

supports the need for separate handling of short-haul and long-haul operations. The Chamber argued that short-haul operations should not be subject to a rule that fails to produce a net benefit for those operations.

Carriers

United Parcel Service (UPS) cited research showing that fatigue effects are less likely in short-haul drivers because they work daylight hours, have work breaks, begin and end at their home location, and sleep in their own bed at night. The research also found that drivers who work in short-haul operations have varied task responsibilities compared to the monotonous task of driving long-haul routes, and this is also a factor in the lower level of fatigue.

UPS noted that if short-haul driving is not a substantial cause of fatigue, strict HOS regulations are less likely to have beneficial safety effects. UPS concluded that the HOS rule should be modified to recognize the differences between long-haul and short-haul operations. UPS proposed that FMCSA permit an individual who drives less than 25 hours per week and 5.5 hours per day, and whose driving is primarily local, to extend the 14-hour duty-period by the amount of time taken in breaks and other off-duty time, and to combine split periods of off-duty time for the purpose of acquiring the ten hours of off-duty time necessary to return to duty. UPS also proposed that the 100 air-mile radius rule allow a driver to return to his or her work reporting location within 14 consecutive hours, instead of the 12 hours currently specified.

Other trucking companies also expressed concern with the short-haul provisions. One small carrier urged FMCSA to retain the exemption that allows an additional 2 hours of duty time once per week. Another supported the exemption and suggested a traditional time clock formula for tracing duty time by requiring the drivers to ''punch in and out.''

FMCSA Response

The research and data reviewed by the Agency demonstrate that fatigue has relatively little impact on short-haul trucking. The comments also strongly support that conclusion. Because the benefits of HOS regulations for those operations are quite disproportionate to their costs, FMCSA has decided to create a new regulatory regime for a more specific subset of short-haul operations.

Under the rule adopted today, drivers of CMVs that do not require a CDL to operate will be allowed to extend their 14-hour duty ''window'' by 2 hours twice per week, but the driver must: (1) Have 10 consecutive hours off-duty prior to the start of the workday; (2) not drive after the 14th consecutive hour since coming on-duty on the days he or she does not use the 2 additional hours provided by this provision; (3) not drive more than 11 hours after coming on duty; (4) not drive after having been on duty for 60 hours in a 7-day period, or 70 hours in an 8-day period, including the 34-hour recovery provision; (5) not operate beyond a 150 air-mile radius from the location where he or she reports to, and is released from, work; and (6) return to his or her work reporting location at the end of each work day. In addition, these drivers will not have to keep records of duty status. However, the employing motor carrier must maintain a time record for six months showing the time the driver reports to, and is released from work, consistent with the time keeping requirements under the current 100 air-mile radius exemption. To simplify compliance with this new short-haul HOS provision, drivers to whom it applies will not be able to use the sleeper berth exception or the current 100 air-mile radius short-haul exemption.

Short-haul drivers are unique to the motor carrier industry in that they do not drive for long periods of time. The nature of short-haul operations (repeated pickups and deliveries) and vehicles (too small for operations that require long driving stints) make driving long hours logistically and economically unfeasible and unnecessary. Hanowski [Hanowski, R.J., *et. al* (1998), p.5] found that only 50 percent of a short-haul driver's time is actually spent driving, and that time was scattered throughout the day. However, these operations do experience occasional extended days during peak times of the year where the necessity to extend their work day by 2 hours is needed.

Due to the variety of tasks short-haul drivers conduct throughout the day, traditional ''time-on-task'' models do not apply. However, through the Agency's literature search both laboratory and field research studies were found that support the ability to work a 16-hour shift without significant degradation of performance. A laboratory study of sleep restriction and sleep deprivation found the critical limit to wakefulness when performance begins to lapse was statistically estimated to be about 16 hours [Van Dongen, H.P.A, *et al.* (2003), p. 123]. In a study of drivers in New Zealand, researchers found that drivers could maintain their performance until about the 17th hour of wakefulness, after which performance capacity was sufficiently impaired to be a safety concern [Williamson, A.M., *et al.* (2000), p. 19].

While the short-haul industry can experience long work days during peak times of the year, it is the Agency's best judgment that longer workdays will not translate into longer driving times in the short-haul environment where there is relatively little driving, but rather several other job-related activities. As noted earlier, short-haul drivers rarely, if ever, accumulate 11 hours of driving, regardless of the workday length. FMCSA concludes that the rhythm of local operations will limit the use of this new provision in any case, but the Agency wants to give this segment of the motor carrier industry as much flexibility as possible to structure their operations efficiently, while still providing a safety regime to address deficiencies.

The research is limited on issues related to the health of short-haul drivers. However, one study specifically addressed driver health issues and short-haul drivers. This study identified the occupational stress that short-haul drivers encounter on a daily basis. Orris *et al.* administered a questionnaire to 317 short-haul drivers who worked out of distribution centers in New Jersey, Wisconsin, Texas, and California [Orris, P., *et al.* (1997)]. Each participant was given a packet that included six self-administered questionnaires related to occupational stress. The results indicated that short-haul drivers had a significant elevation of stress-related symptoms over the general adult population. Further analyses indicated that one reason for the stress was that drivers believed that their workload was unreasonable, and that they were faced with rigid deadlines.

Another study [Hanowski, R. J., *et al.* (1998)] conducted focus groups with 82 experienced short-haul drivers to identify safety problems in the short-haul industry. The two top concerns most often mentioned by short-haul drivers were the problems caused by drivers of light non-commercial vehicles and stress due to time pressure [*Id.*, p. 70]. As identified in the comments to the docket, occupational stress due to rigid time pressure and not having enough time in the day to get the job done was mentioned as a safety problem.

The short-haul provision in this final rule does not increase the maximum permissible weekly work hours (the 60 and 70-hour rules are still applicable to short-haul drivers) or daily driving time (the 11-hour driving limit per day)

allowed in today's final rule. However, the provision does provide short-haul operations greater flexibility in scheduling, especially during periods of peak demand. For 2 days per week, short-haul drivers will be allowed 2 additional hours during which they can drive, although their total maximum daily driving time remains the same. The Agency believes this will reduce the occupational stress short-haul drivers feel when trying to make too many deliveries in a limited time. FMCSA has concluded that this short-haul provision will not adversely affect the health of short-haul drivers.

Short-haul drivers do experience fatigue, however, and in a field study it was found that these drivers take 1-to 2-hour naps to reduce any fatigue accrued during the course of a normal work day. The study showed that these naps are taken while drivers wait for their vehicle to be loaded or unloaded or during normal meal breaks [Balkin, T., *et al.* (2000), p. 4–63]. These naps are in addition to the routine breaks these drivers utilize through the course of their day. FMCSA has concluded that the unique characteristics of their operations enable short-haul drivers to maintain the alertness and vigilance needed to drive up to the 16th hour after coming on duty twice a week, a conclusion supported by the fact that short-haul drivers are involved in fewer crashes per vehicle miles traveled than long-haul drivers.

Vehicles that require the driver to have a CDL are defined as any ''motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle (a) Has a gross combination weight rating of 11,794 kilograms or more (26,001 pounds or more) inclusive of a towed unit(s) with a gross vehicle weight rating of more than 4,536 kilograms (10,000 pounds); or (b) Has a gross vehicle weight rating of 11,794 or more kilograms (26,001 pounds or more); or (c) Is designed to transport 16 or more passengers, including the driver; or (d) Is of any size and is used in the transportation of hazardous materials as defined in this section'' [49 CFR 383.5]. Drivers of vehicles transporting placardable quantities of hazardous materials will not be able to use this new rule because they are required to have a CDL, regardless of the weight of the vehicle. However, the new regulatory regime is applicable to drivers who possess a CDL, but drive a vehicle that does not require a CDL to operate.

By limiting the applicability of this short-haul rule to operators of vehicles not requiring a CDL, the Agency is using a recognized and logical break point. Vehicles with a weight of less than 26,001 pounds have long been acknowledged by law enforcement, the International Registration Plan (IRP) requirements, truck manufacturers, and Congress as a distinct vehicle class. In most cases, the size of a vehicle determines the class of driver's license needed to operate it. Only when a vehicle carries a placardable amount of hazardous materials do the size and weight of the vehicle not make a difference. The IRP is a commercial vehicle registration system entered into by the individual states of the United States (excluding Alaska and Hawaii), the District of Columbia, and various provinces of Canada that allows one IRP member to process commercial vehicle registrations and collect fees for other members. The IRP uses 26,000 pounds as its weight threshold, demonstrating that States consider this weight a non-arbitrary divide between vehicles likely to be operated in interstate commerce over long distances and those that operate locally. The IRP ''apportioned'' license plate will also help alert law enforcement officers to vehicles that are most probably over 26,000 pounds, thus identifying drivers not eligible for this new regulatory regime. In addition, regardless of license plate, law enforcement officers are trained under 49 CFR 383.91 to recognize vehicles under 26,001 pounds by their appearance. The classification system used by truck manufacturers and the National Highway Traffic Safety Administration has long specified 26,000 pounds as the upper limit for a Class 6 truck [49 CFR 565.5, Table III]. Congress itself recognized the limited operational role of lighter vehicles by requiring a CDL only for drivers of Class 7 and 8 trucks starting at 26,001 pounds GVWR (and certain passenger and hazmat vehicles).

Groups such as the NRMCA, NSSGA, and the CRMCA represent short-haul motor carriers, but virtually all of their operations involve CMVs that weigh more than 26,000 pounds. FMCSA has decided not to extend the new regime to all short-haul carriers, but only those using smaller (*i.e.* under 26,001 lbs) vehicles. Many short-haul operators use van or tank trailers indistinguishable from those employed in long-haul trucking, for example, to re-supply supermarkets or gas stations. While ready-mixed concrete trucks are not used in long-haul operations, they do require a CDL to operate. Vehicles that require a CDL are likely to be driven more than smaller vehicles that do not, simply because their capacity makes them ideal for transporting large loads point-to-point, but not for local delivery. The combination of more driving time and greater mass makes these vehicles potentially more dangerous than smaller trucks. FMCSA has therefore concluded that the new HOS regime should be limited to operators of lighter truck (*i.e.*, those not requiring the driver to hold a CDL).

When reviewing the activities of CMV drivers, the Agency found that drivers of light vehicles spend less time driving and more time completing other non-driving tasks, such as those referenced earlier. The economics of this concept are fairly straightforward: The greater the cargo capacity of the vehicle, the greater the benefit of operating it longer distances and for longer hours. Conversely, the less cargo capacity, the less economic sense it makes to operate the vehicle over longer distances, or for longer hours. Thus, drivers in operations that use lighter vehicles are less likely to spend time driving. Operationally, the lighter vehicles tend to be smaller and more maneuverable, making them ideal for local pick up and delivery operations in localized settings. The drivers spend most of their time in and out of the vehicle, serving their customers and doing ancillary duties, such as stocking shelves and checking inventories.

This analysis is supported by data in the U.S. Census Bureau's 2002 Vehicle Inventory and Use Survey (VIUS) which shows that about 90 percent of all trucks weighing 26,000 pounds or less operate within a 150-mile radius. VIUS also shows that trucks with a GVWR of less than 26,001 pounds with a primary range of operation within 150 miles comprise about 46 percent of all trucks operated in the United States. Only a small portion of these vehicles require the driver to possess a CDL.

Trucks Involved in Fatal Accidents (TIFA) data from the years 1994 to 2002 (excluding 2001) show that about 12.7 percent of all CMVs involved in fatigue-related crashes weighed less than 26,001 pounds. Additionally, TIFA data indicate that CMVs weighing less than 26,001 pounds and engaged in trips of 150 miles or less account for only 6.8 percent of all large trucks involved in fatigue-related fatal crashes between 1994 and 2002. Conversely, these vehicles represent 52 percent of all large trucks registered in 2002, according to the U.S. Census Bureau's Vehicle Inventory and Use Survey.

A study of Short-Haul Trucks and Driver Fatigue by Dawn Massie and her colleagues found that short-haul trucks (which they defined as Class 3–6 straight trucks, i.e. 10,001 to 26,001

pounds) have a very low fatal-involvement rate compared to other trucks [Massie, D.L., *et al.* (1997), pp. 20–21]. As FMCSA pointed out in the 2000 HOS NRPM, the Massie study concluded that ''[l]ocal single-unit straight trucks had an average of 0.0022 fatigue-related fatal involvements per 1,000 registered trucks. The comparable figure for long-haul tractor-trailers was 0.0781, approximately 35 times higher. On a per-mile basis, long-haul trucks were almost 20 times more likely to be involved in a fatigue-related crash.'' [65 FR 25540, at 25546].

There are some possible reasons for these lower fatigue-related crash rates. Drivers in short-haul and local operations spend relatively little time actually driving the vehicle. The drivers in the study by Hanowski [Hanowski, R.J., *et al.* (2000), p. 77] reported an average shift time of 10.89 hours but only averaged 92 miles of driving per shift. The drivers primarily worked 5 days per week. In fact, of the 462 shifts examined by Hanowski, there were only two instances where a driver worked on a Saturday and both of those shifts were less than 8 hours long. Hanowski found that about 61 percent of drivers' time was spent completing tasks other than driving—35 percent on loading/unloading and 26 percent on other assignments (vehicle inspections, merchandising, etc.).

In addition to reduced driving time, reports suggest that light to moderate physical activity during the workday lessens a driver's physiological fatigue. For example, Mackie and Miller stated that ''light work stress did not lead to any cumulative fatigue'' and there were ''[n]o significant differences in subjective fatigue between drivers who engaged in light versus moderate cargo loading'' [Mackie, R.R., & Miller, J.C. (1978), p. X]. Hanowski found that drivers classified as not fatigued spent over an hour more time loading and unloading the vehicle. The explanation, he and his colleagues concluded, ''is that the physical loading/unloading helps drivers avoid fatigue'' [Hanowski, R.J., *et al.* (2000), p.112].

For all of these reasons, in the Agency's best judgment, a new HOS regime for a specific subset of short-haul operations is warranted. However, FMCSA will closely monitor fatigue data, particularly fatigue-related crash data for this group of carrier operations, and will look at further fatigue-related research on short-haul operations.

J.11. Combined Effects

Commenters provided a variety of responses to the Agency's NPRM request to provide studies or other data on the ''combined or net effects'' of the various regulatory provisions in the 2003 rule on driver health, the safe operation of CMVs, and economic factors. The Agency also asked about ''mutual interactions'' of the various provisions. Consequently, commenters discussed the combined effects and interactions of the provisions on health and safety. In addition, they discussed both how health and safety are related to each other separately and when considered with various provisions. Combined effects for purposes of this discussion are distinguished as follows: (1) A cumulative effect refers to the net impacts of various provisions; and (2) interactions refer to how changes to one or more provisions impact one or more other provisions.

Comments

Paradigm Shift Needed? Circadian Technologies stated that the complexity of the issues requires consideration of a new, flexible paradigm. A summary of their comments follows: The 2003 rule focuses on effects of the number of hours allocated to the existing provisions after beginning a work week, but does not acknowledge that alertness, safe performance, and health of a driver depend far more on how sleep-deprived a driver is than how many hours he or she has been on duty or driving. Continuous wakefulness (which can be longer than duty-tour time), sleep length and quality, and sleep obtained over the prior week are highly relevant to fatigue. According to Circadian Technologies, the 2003 rule may unintentionally require drivers to rest when sleep is difficult to obtain, compress their sleep when it is most needed, and discourage them from interrupting their duty time to take brief naps. This may result in high levels of chronic and acute sleep deprivation. The complex interaction between sleep science and trucking operations defies a one-size-fits-all rule that is understandable by drivers and enforceable by regulators.

FMCSA Response

In drafting this final rule, the Agency balanced the potential safety and health impacts, and costs, while considering compliance and enforcement issues. In the 2000 NPRM, FMCSA attempted to tailor the rule to specific industry sectors and their unique operating environments to avoid a blanket approach. This tailored approach, however, was firmly rejected by a substantial majority of industry as unduly complex. Circadian Technologies was the sole commenter suggesting a paradigm shift was needed, and neither the public interest advocates nor industry supported replacing the 2003 provisions with a new paradigm in the 2005 rule. A significant body of research supports retaining the major provisions of the rule, modified by the changes discussed earlier.

Comments

Health. Different perspectives were provided by commenters regarding the health risks of the 2003 rule, though all were described as cumulative, versus interactive. ATA stated that potential driver exposure to diesel exhaust emissions have decreased substantially over the last several years and such decreases will likely continue. In addition, these potential DE hazards are now within levels established by EPA and OSHA. ATA also stated that the 2003 rule provides a sufficient sleep opportunity to mitigate the potentially adverse health outcomes from sleep debt.

Others disagreed with this assessment, based on substantive and procedural issues. Regarding their substantive concerns, Public Citizen requested that FMCSA address diesel emission-related health risks by significantly decreasing both daily and weekly driving hours. NIOSH commented that there are potential long-term health effects associated with repeated periods of extended duty, especially given that the 2003 regulations permit up to 84 duty hours per 7 days, or double the duty hours of the average U.S. worker. They also noted that long-term exposure to extended work hours and driving in particular may have health consequences, including raised risks of myocardial infarction and back injury. Alertness Solutions agreed that driver health factors related to fatigue, such as total and partial sleep loss, extended wakefulness, and circadian disruption, have been associated with degraded physiological and health outcomes. However, Alertness Solutions pointed out that the studies generally have shown that total sleep loss or sleep restriction to 4 hours for 6 consecutive nights is required to trigger these associations.

Of the several points AHAS made on health impacts, two are summarized as follows: first, the rule does not address the health impact of potentially increasing duty tours by 40 percent and driving hours by 30 percent, or allowing drivers to alternate between 11 hours of driving and 10 hours of off-duty time; and second, sleep debt from long or irregular shifts is strongly associated with major changes in metabolic and endocrine function.

AHAS maintained that there was not an independent review of health effects by FMCSA prior to issuing the 2003 rule. Also, they stated that the Agency cited but failed to apply health study findings previously cited in its 2000 NPRM and 2003 final rule.

FMCSA Response

It appears that chronic exposure to DE may cause cancer. The exposure/dose required, however, is currently unknown, due to the extreme difficulty in measuring and modeling exposure. For instance, EPA has noted that there is great ''uncertainty regarding whether the health hazards identified from previous studies using emissions from older engines can be applied to present-day environmental emissions and related exposures, as some physical and chemical characteristics of the emissions from certain sources have changed over time. Available data are not sufficient to provide definitive answers to this question because changes in DE composition over time cannot be confidently quantified, and the relationship between the DE components and the mode(s) of action for DE toxicity is unclear'' [Ris, C. (2003), p. 35]. EPA's combined actions of tightening the standards for DE and fuel standards lead to a projection of dramatically lower DE through 2030. Based on these projections, the health effects linked to DE should be reduced over time.

The Agency has two responses regarding the health impacts of longer hours permissible under the new regulations. First, based on research conducted by FMCSA, including literature reviews performed by the National Academies (see process discussion in next paragraph), there is a lack of knowledge on, and great deal of uncertainty about, whether the potential long hours alone adversely affect driver health. Second, even if there is a potential for impacts from longer hours for drivers, despite the uncertainties of detection and modeling described above, based on FMCSA's driver survey, data from Campbell and Belzer (2000), and data submitted by carriers, including Schneider National and FedEx, there is no evidence that drivers have drastically increased their hours of driving or work. Therefore, there is no evidence drivers will be subject to deleterious health effects [under 49 U.S.C. 31136(a)(4)] resulting from their exposure to DE based on changes to the rule published today. In conclusion, regarding DE exposure and health impacts, FMCSA believes that while DE probably entails some risk to drivers, today's HOS rule neither causes nor exacerbates that risk, compared to the pre-2003 rule.

From a process perspective, in preparing the final rule FMCSA extensively researched both health and fatigue studies through consultation with an inter-agency group of Federal safety and health experts. First, the Agency reviewed numerous studies, which included those findings previously cited in its 2000 NPRM and 2003 final rule. Second, as discussed in detail in section D, we tasked nationally known health and fatigue experts associated with the National Academies' Transportation Research Board (TRB) with conducting a thorough literature review of studies relevant to this rulemaking. Specifically, this review included research findings that discussed in a scientific, experimental, qualitative, and quantitative way the relationship between the hours a person works and drives, the structure of the work schedule (on-duty/off-duty cycles, time-on-task, especially time in continuous driving, sleep time, *etc.*), and the impact on the health and fatigue of a commercial motor vehicle driver.

As a result of the questions raised in the NPRM, commenters cited over 200 studies to the HOS docket concerning health and fatigue. Of these, the TRB team utilized the screening criteria from the original research stage and selected key studies to review and summarize for this health and safety evaluation.

Comments

Fatigue: Cumulative effects. Several commenters raised concerns about the perceived negative cumulative effects of the 2003 rule. Also, based on interviews of long distance drivers in two States, the Insurance Institute for Highway Safety (IIHS) found that drivers are driving more hours and that fatigued driving is at least as common as it was previously. IIHS, Public Citizen, and AHAS voiced concern about the potential for increased fatigue based on the increase in driving of both daily and weekly hours. IIHS also emphasized that the impact is due to the fact that up to 42 percent of drivers in one interview said they drove 10 or more hours a day and used the recovery provision. AHAS criticized Alertness Solutions' paper submitted to the docket as an attempt to cast doubt on relevant studies while ignoring a significant amount of key literature supplied both by AHAS and FMCSA showing that the rule's provisions in combination lead to increased fatigue, lower performance, and a higher risk of crashes. AHAS further asserted that while Rosekind of Alertness Solutions agrees with FMCSA in his earlier literature that two successive nights of sleep are needed for recovery, he contradicts this in his comment submitted to the docket via Alertness Solutions by arguing that two 8-hour periods are adequate.

On the other hand, numerous carriers raised the point that over the 2003–2004 year crash frequency declined, resulting in a marked safety improvement. The National Private Truck Council (NPTC) was one of many industry representatives which acknowledged that, while it is hard to definitively link these safety improvements to the hours-of-service rules, the rule was in many cases the ''only variable'' that changed over that year. This data, according to these commenters, refutes arguments made by others about the negative impact of the 2003 rule. Several commenters, such as FedEx Ground, noted that such safety improvements were notable in light of an overall increase in vehicle miles traveled. The Motor Freight Carriers Association stated that the cumulative effect of the various provisions resulted in positive safety benefits. The National Industrial Transportation League (NITL) stated that the provisions in the 2003 rule combined to significantly ameliorate chronic fatigue. The American Moving and Storage Association (AMSA) cited data they collected to support the safety benefits of the new rule, which stem from a more natural circadian routine and additional rest time.

Fatigue: Interactions/Offset. Several commenters raised concerns about how the various provisions interacted or offset each other. Some disagreed with how the various provisions were allocated quantitatively (*e.g.,* hours of driving time) and argued that their interaction resulted in reduced safety. For instance, AHAS stated that even assuming the benefits of increasing off-duty time by two hours under the 2003 rule, the dramatic increase in weekly driving hours permitted by the 34-hour recovery period ensures that drivers will be more, not less fatigued and be more exposed to risk. Similarly, Public Citizen noted that even assuming positive benefits of the decreased tour of duty provision under the 2003 rule, the increased driving allowed may negatively offset such benefits. They also said that crash risk may increase as a result. The AFL–CIO maintains that the cumulative fatiguing effects of an extra hour of driving each day and the 34-hour recovery provision negate the positive aspects of establishing a 24-hour clock.

Many commenters supported the safety benefits resulting from the interactions of the provisions. For example, ATA supported the Agency's

conclusion that it could permit a 1-hour increase in driving time from 10 to 11 hours because it had mandated an overall reduced tour of duty. Also, while the length of duty tour needs to be limited based on research concerning continuous wakefulness, little is known about the impacts of driving time. According to C.R. England, the interaction of the current provisions provides good balance by allowing additional driving time (11 hours) with more rest opportunity (10 hours) and a 34-hour recovery period to recover from any cumulative fatigue that may occur. They also pointed out that the 10-hour off-duty provision eliminates daily fatigue while the two 8-hour sleep periods in the 34-hour recovery provision provide an adequate opportunity for full recovery. Schneider National Inc. agreed that the 10-hour off-duty provision eliminates daily fatigue, while the 34-hour recovery provision eliminates cumulative fatigue on a weekly basis. They also noted that the 10-hour off-duty period supports both the 11 hours of driving and 34-hour recovery provisions. Fresenius Medical Care stated that under the 2003 rules, the driver usually has adequate time to commute and attend to personal matters, while still obtaining 8 consecutive hours of sleep. FedEx Freight argued, regarding the 11th (added) hour of driving provided by the 2003 rule, that ''statistically'' no crashes happened after the 10th hour of driving; therefore, no offsetting adjustments in other provisions are needed. Based on International Paper's experience with the rule, the majority of drivers do not have the opportunity to drive a full 11 hours, given the impact of the maximum ''on-duty'' of 14 hours, and any reversal of this would not achieve the desired increase in safety.

Fatigue: 24-hour Cycle. The interactions resulting in a movement towards a 24-hour clock were characterized by commenters as beneficial, though some concerns were raised. The two main issues were: First, the composition of the 24-hour cycle through the combination of the 10-hour off-duty period with the 14-hour driving window; and, second, the impact of backward rotating schedules. First, according to ATA, the 14 consecutive hour on-duty limit, coupled with 10-hours off-duty requirement, is a synergistic safety feature of the new rule resulting in a consistent 24-hour work-rest cycle. Tennessee Commercial Warehouse noted that for long-haul drivers, the 14 consecutive hour shift, coupled with the 11 hours of driving, has allowed them to maintain their income level and establish a 24-hour cycle; consequently, drivers take their off-duty break about the same time every day. Second, according to Circadian Technologies, by extending both the number of hours of off-duty time required per day (from 8 to 10), and the number of hours of driving allowed (from 10 to 11), the new rule extends the minimum day-night cycle from 18 hours to 21 hours, assuming drivers drive the maximum allowable (and have no on-duty not-driving time). This reduces the likelihood of drivers falling into backward rotating schedules that can impact health and fatigue. While such schedules are still permissible under the rule being adopted today, the added off-duty hours help reduce the severity of the rotation. ATA's comment on this topic typified other associations, suggesting that even if a driver maximizes driving time with little additional duty time and takes the minimum 10 hours off-duty, this 21–22 hour cycle comes closer to a 24-hour circadian cycle than the 18-to 19-hour cycle possible under the pre-2003 rule.

Among those raising concerns about the 24-hour cycle, Circadian Technologies maintained that a 24-hour clock does not help a driver whose first off-duty period starts during a time of day when it is difficult from a circadian standpoint to sleep. Public Citizen noted that, based on FHWA's 1996 study, the strongest and most consistent factor influencing driver fatigue and alertness was time of day; drowsiness was markedly greater during night driving than during daytime driving. They also noted that while the Agency has suggested that the 14-hour duty tour/10-hour off-duty provisions combine to establish a 24-hour schedule, the one hour reduction in duty tour is not relevant to the number of driving hours because drivers will utilize the maximum driving hours to enhance their wages and meet deadlines. On the other hand, drivers will tend to minimize clocking on-duty hours, because they do not typically get paid on that basis. To address these perceived shortcomings, Public Citizen suggested that drivers on long shifts be required to use the remaining on-duty hours available after they finish driving or add on the remaining hours to their off-duty period. This would ensure that drivers remain on a true 24-hour schedule.

Fatigue: Breaks. According to ATA, the benefit of having a work limit within a duty period is that it creates other time within which breaks can be taken; such breaks can have a beneficial effect on fatigue. Other commenters, including Circadian Technologies and several drivers, argued that, despite the positive benefits of attempting to achieve a 24-hour cycle, the 14-hour on-duty cycle has the negative effect of discouraging rest breaks, which may include beneficial naps.

Fatigue: Quality of Life Impacts. FMCSA asked whether drivers were obtaining more rest under the 2003 rule and whether the quality of their lives had improved. The results are shown below in Figure 10.

FIGURE 10.—COMMENTS ON REST AND QUALITY OF LIFE UNDER 2003 RULE

	Carriers	Drivers	Other*
More Rest:			
Yes	29	114	5
No	4	46	2
Quality of life:			
Better	18	70	2
No Change	1	16	1
Worse	3	34	1

*Includes comments from trucking associations.

Commenters mentioned that the rule's off-duty time provided the opportunity not only for sleep, but also for relaxation and personal tasks. Of the drivers and owner-operators who stated that they do not get more rest, some criticized the 14-consecutive-hour provision because naps and rest periods do not stop the duty-tour ''clock.'' Drivers also thought that off-duty/sleeper-berth time was too long, and waiting for the time to end was very tiring. Other drivers said that

the rule caused them to waste more time and to drive in worse conditions.

The commenters who said the quality of their lives had improved under the rule credited the reduced or regulated workday that allowed them to have more time at home and for leisure activities. They also mentioned an improved relationship with carriers, shippers, and receivers because the companies recognize that the rule limits the time a driver can be on duty. Those who reported no change or a worse quality of life cited the 14-hour rule and the requirement for a 10-hour off-duty period when away from home.

Two commenters thought their quality of life was better in some ways and worse in others because of the rule. One commenter noted that there was confusion about the rule's provisions, *e.g.*, some drivers think they are required to sleep for 10 hours. Two carriers had surveyed their drivers. Landstar Systems found that 73 percent of the drivers thought their personal lives had not changed and 44 percent said they were home less often under the rule. J.B. Hunt found that 38 percent of the drivers saw no effect on their personal lives and only 15.8 percent thought their personal lives had improved under the rule.

Fatigue: Regulatory Impact Analysis. Public Citizen noted that FMCSA failed to demonstrate how the extra off-duty time enhances a driver's ability to drive an additional hour. Public Citizen also stated that while the Agency claimed the rule produced substantial net safety benefits, the RIA did not take time-on-task into account. In addition, the notion that time-on-task effects are zero is implausible. If driver fatigue rises with additional consecutive driving hours and drivers are fatigued after 8 hours, they will be more tired after 11 compared to 9 or 10 hours; if they are fatigued after working 60–70 hours in 7 or 8 days, they will be even more so after working 84–98 hours in the same periods.

FMCSA Response

Cumulative Effects, Interactions/offsets, Breaks, Quality of Life, and RIA. The Agency requested and received comments about both cumulative and interaction impacts on fatigue, has collected new data, and has thoroughly reviewed the scientific evidence. FMCSA's best judgment is that the rule finalized today provides the best possible regulation considering both the cumulative and interaction impacts on fatigue. Our response to both types of effects are discussed together later in this section.

Today's rule can be summarized in six points: (1) Adopts 11 hours of daily driving time as the maximum allowed following a 10-hour off-duty period; (2) adopts a 14-hour duty tour ''driving window;'' (3) eliminates the split sleeper berth exception traditionally allowed by requiring 8 hours of consecutive anchor sleep and an additional two hours of off-duty or sleeper-berth time; (4) requires a 10-hour off-duty period; (5) allows a 34-hour recovery provision; and (6) provides that short-haul drivers of vehicles not requiring a CDL who operate within a 150-mile radius of their normal work reporting location may drive 11 hours within a 16-hour work shift 2 days in any period of 7 consecutive days, while, among other provisions (further described in Section J.10 on short-haul operations) requiring compliance with the same provisions applicable to other drivers (described in this paragraph above) for the other 5 days.

The Agency's seven fatigue-related rationales for the rule being adopted today, based on extensive research into these provisions and how they are related, follow.

First, compared to pre-2003, the Agency is adopting a shorter and stricter duty tour ''window'' to prevent drivers from drastically extending their day through the use of breaks. Adopting this provision is justified because continuous daily wakefulness is among the strongest predictors of fatigue, and the Agency's best judgment indicates it outweighs driving time as a predictor of fatigue. Therefore, FMCSA is requiring this provision to reduce driver fatigue by ensuring that the provision extending the work day is eliminated.

Second, the Agency modified the 2003 sleeper berth provision to ensure all drivers have the daily opportunity to obtain 8 hours of consecutive rest and a total of 10 hours off-duty. Specifically, the split sleeper berth provision has been eliminated and each driver using a sleeper berth must obtain a primary period of 8 consecutive hours of off-duty time in the berth. Such drivers must also take an additional 2-hour off-duty period that is in or outside of the sleeper berth, either consecutively with, or separately from, the primary 8-hour period. The 10-hour off-duty period will enable drivers to combat daily fatigue, provide opportunities to attend to personal matters, and obtain rest, including naps. The ability for the driver to take a nap later in the day is an important benefit, especially considering that drivers taking advantage of the sleeper berth exception could be on a rotating schedule, or off a natural circadian rhythm.

Third, the Agency concluded that an 11-hour driving time provision combined with a 14-hour non-extendable driving window provide a greater opportunity for daily sleep compared to the pre-2003 rule, which allowed for a 15-hour extendable driving window with only 8 hours off duty. The available research and crash data do not clearly indicate whether the 11th hour of driving, combined with other provisions of the 2003 rule, poses a significant safety risk to drivers. Since industry and Agency data show that the 11th hour is not fully utilized, any safety risk to drivers is lower than the possible worst case scenarios, which assume full use of all allowable driving hours, would suggest. In sum, it is the Agency's best judgment that the potential safety benefits to eliminating the additional one hour of driving are not great enough to justify the high cost of such a change. As noted above, the 10-hour off-duty period ensures that all drivers, including those utilizing a sleeper berth, have an opportunity to obtain an uninterrupted block of 8 consecutive hours so that fatigue is eliminated, or significantly reduced, on a daily basis. Adopting a 10-hour off-duty period is supported by NTSB's 1996 report finding that the most critical factors in predicting fatigue were the duration of the most recent sleep period prior to the crash, length of time since last sleep period, sleep over the preceding 24 hours, and split-sleep patterns. The Agency recognizes that drivers, beyond sleep, have other needs to attend to, including commuting, performing errands, and addressing other personal and family matters. The extra 2 hours beyond those needed for sleep ensures a driver can complete such tasks. The interaction between these provisions enables the vast majority of drivers to work and drive to the maximum permissible limits per day (even if they chose not to do so), without developing a cumulative sleep debt.

Fourth, the Agency considers the 34-hour recovery provision to be a safety net for the other provisions in the exceptional case where a driver has not obtained sufficient rest, despite 10 hours off duty (including for sleeper berth drivers) combined with a 14-hour non-extendable driving window. Given that the Agency has reduced the driving window requirement by 1 or more hours, the negative effects of longer weekly driving hours has been addressed on a daily basis. The Agency acknowledges that the recovery provision allows a driver to drive

additional weekly hours, but we believe the 34-hour period affords sufficient time for 2 nights of 8-hour sleep for the vast majority of drivers and an 18-hour intervening period of wakefulness that in combination allow for weekly recovery from any sleep debt accumulated by a driver over multiple days. In addition, night drivers will accumulate less fatigue on a daily or weekly basis compared to the pre-2003 rule through the combined effects of the provisions discussed in this section. For night drivers, the two 8-hour sleep periods give drivers an adequate opportunity to help minimize acute and cumulative fatigue, regardless of their driving schedule. However, worst-case scenarios presented by commenters (and FMCSA in the NPRM) regarding total hours operators may drive under the 2003 rule are not realistic nor supported by operational and safety data (see rationale seven below for detailed discussion). Another major benefit to adopting a recovery period is that it allows drivers to begin their work schedule at approximately the same time each day as their last shift; hence, this will avoid shifting of daytime to nighttime schedules that research shows can disrupt the circadian rhythm by promoting fatigue and potentially higher crash risk. Also, because recovery can be taken at any time, it can be used when needed most by drivers to maximize safety.

The Agency considered adopting a 44-hour recovery period. The Agency has concluded, however, there is no conclusive scientific data available at this time to guide us in determining which factor (recovery vs. circadian disruption) is more predictive in alleviating fatigue. Hence, considering a longer recovery period illustrates the profound complexity concerning this issue.

The Agency has weighed the concerns with night driving and the benefits of night sleep; however, the fatigue risks of restricting night driving are outweighed by two counterproductive consequences: safety problems from increasing daytime traffic, and the significant economic impact on industry. For example, a 44-hour recovery period would cause the severe traffic-related and economic impacts described above (see Section J.8). After reviewing the combined effects of all the provisions compared to the pre-2003 rule, the Agency is adopting a 34-hour recovery provision because it acts as a flexible, weekly safety net that will benefit the vast majority of drivers who fail to obtain daily rest with two extra hours (10 hours) of daily off-duty time (including sleeper-berth users), and a non-extendable (14-hour) driving window.

Fifth, the Agency concluded that for drivers who take their 10-hour off-duty period in tandem with the 14-hour driving window (*i.e.*, one after the other), these provisions collectively will help keep them on a 24-hour cycle, thereby mitigating or eliminating the deleterious effects of the circadian de-synchronization on driver sleep and alertness. There was near consensus among commenters that the combined effects of these provisions reduce fatigue, leading to positive safety benefits. The Agency believes that the 2003 rule's movement toward a 24-hour cycle has helped to regularize drivers' schedules and thereby minimize fatigue. FMCSA acknowledges that neither the 2003 rule nor today's rule eliminates the possibility that drivers will utilize backward rotating schedules by combining driving and off-duty time, while minimizing other on-duty not-driving time (*e.g.*, long-haul driver on day two of a trip that requires no additional loading). The change from an 18- to 21-hour cycle between the pre-2003 and 2005 rule reduces the likelihood and severity of drivers falling into backward rotating schedules that induce fatigue.

Sixth, the Agency is creating a new regulatory regime for drivers of small, short-haul CMVs in today's rule that allows them to drive within a 16-hour window twice a week. This industry segment experiences less driving-related fatigue and poses a lower crash risk compared to the long-haul trucking operations also covered by this rule. Today's rule does not increase the maximum number of work hours (60- and 70-hour rules are still applicable to short-haul drivers) or daily driving time (11-hour driving limit per day) allowed small, short-haul CMVs. This provision is expected to be utilized intermittently and to provide flexibility to meet seasonal and peak demands without leading to longer driving or significantly longer duty-tour times. Therefore, due to the unique attributes of the short-haul sector described below (and detailed in the short-haul section, J.10) and given that the limited number of added hours do not create a net increase in driving or duty hours over multiple days, this provision will not adversely impact drivers' health or safety.

Short-haul drivers have an opportunity for daily and weekly fatigue recoveries that typically exceed those of other trucking sectors. Short-haul operators drive less than 40 percent of their total duty tour, and their driving tasks are broken up by frequent deliveries and light to moderate work-related physical activity. Both factors lead to less accumulation of driving-related fatigue compared to long-haul drivers. In addition, the regularity of typical short-haul drivers' schedules differs from other drivers in that they sleep at home each night, have 5-day schedules with limited weekend work, and usually are provided at least a 48-hour recovery period over the weekend, consistently providing the opportunity for two 8-hour nights of sleep.

Based on the scientific literature analyzed by FMCSA, and when considered with the combined effect of other provisions enacted by this rule, the Agency concludes that this provision will not lead to negative health or safety impacts. FMCSA believes this 16-hour provision is justified under the continuous wakefulness literature discussed earlier which indicates that performance declines and crash rates increase beyond 16 hours of work. Although we have adopted a 14-hour driving window provision discussed above for other categories of drivers, we believe this 16-hour provision is justified because (1) limiting the availability of this provision to two days per week will not negatively impact short-haul driver safety; (2) the enhanced opportunity for daily and weekly recovery in this unique industry segment creates a reduced fatigue risk, especially since these short-haul provisions, when combined with the other provisions of the 2005 rule, do not create a net increase in driving or duty hours over multiple days; and (3) the FMCSA Field Survey found that these drivers take 1–2 hour naps to reduce any daily fatigue that may occur.

Since these drivers are typically on a fixed schedule, the Agency does not believe that the provision allowing two 16-hour duty tours each week will be used frequently, especially due to the disruption caused by the forward-rotation of the schedule. The Agency has found few studies discussing related health impacts; however, based on the 4 hours of additional duty tour per week and the unique schedule and recovery periods typical to this sector, the Agency concludes there will be no deleterious impacts from this provision.

Seventh, the agency concluded that the worst-case driver fatigue and health scenarios suggested by commenters regarding the 2003 rule's operational impact are not realistic. Most drivers are taking longer recovery periods than the minimum FMCSA is establishing under this rule, indicating that drivers value their rest and personal time and do not always seek to maximize driving time. Further, the average driver is not able to, and realistically cannot, drive and work

the longer weekly hours by utilizing the recovery provision on a regular basis, as described by some commenters. Another reason to doubt the worst-case scenarios advanced by certain commenters is that there is no clear data suggesting that fatigue-related crash risks have risen under the 2003 rule. In fact, FARS data show some decrease in such crashes. Moreover, numerous drivers reported that the 2003 rule's off-duty time provided the opportunity not only for sleep, but also for relaxation and personal tasks. Consequently, their quality of life has been enhanced by the 2003 rule. Furthermore, even for drivers maximizing their driving time (11 hours of driving followed by 10 hours off duty) the resulting 21-hour cycle is closer to the ideal 24-hour cycle than the previous 18-hour ''day'' (10 hours of driving followed by 8 hours off duty). In sum, comments and data by drivers and industry representatives do not substantiate the worst-case scenarios advanced by commenters.

In conclusion, the Agency believes that the combined cumulative and interaction effects of the provisions discussed above will result in less fatigue for drivers and thereby greater safety for the drivers and the public compared to past hours-of-service requirements.

Comments

Health and Safety. Several commenters believe that the 2003 rule has beneficial impacts for both the health and safety of drivers. Regarding health, a commenter cited a potential decrease in sick days. Carriers report that drivers seem to be getting more sleep due to having two extra hours off-duty, giving them more time to relax and rest, which is facilitated by the establishment of a more routine schedule. The routine sleep schedule leads to better quality of sleep. The Distribution and LTL Carriers Association cited net benefits from having more time for rest, errands, and social matters, resulting in general driver satisfaction, which ordinarily leads to a healthy driver. J.G. MacLellan Concrete suggested that the health and safety of drivers is not impacted by the extra driving hours provided by the 2003 rule because most of their drivers work on-site and are not utilizing such driving hours.

Others characterized the cumulative health and safety impacts as negative. Specifically, Public Citizen made the point that the recovery provision adversely affects driver health and safety in two ways: It dramatically increases both weekly driving and duty hours while significantly curtailing much needed weekly rest.

Interactions/offset. The Owner Operator Independent Drivers Association (OOIDA) stated that if there is any negative impact of the use of the 11th hour, it is more than compensated for by the aggregate benefits of a 24-hour clock and an additional 2 hours daily rest per day. Furthermore, FMCSA should not narrowly analyze whether the 1 or more hour reduction in on-duty time offsets the increase in 1 hour of driving time. Instead, the Agency should compare all of the benefits of the rule with any effects of the occasional use of the 11th hour of driving.

Some parties discussed the health and safety aspects of individual provisions. NIOSH concluded that the current data are not adequate to characterize any acute health or safety consequences associated with the 14 hours of daily duty and 11 hours of driving under the 2003 rule. In addition, it is not feasible to conduct an epidemiological investigation of short-term effects for the 2003 rule.

Citing a portion of our NPRM, AHAS stated that the Agency's effort to analyze the combined effects of health and safety issues that are ''inextricably linked'' [70 FR 3343] ignores the court's request to treat health separately from fatigue and safety.

24-hour cycle. Several commenters supported the rule's move toward a 24-hour circadian sleep cycle to benefit drivers' safety and health. For instance, the National Industrial Transportation League (NITL) maintained that by combining a 14-hour workday with the 10-hour off-duty requirement, the HOS rule moves drivers toward a 24-hour cycle that approximates the body's natural circadian rhythm. The benefits of the 24-hour cycle include reduced stress and protection against other deleterious health impacts from abnormal sleep patterns. NITL also suggested that while a 21-hour day is unlikely because of the non-driving tasks, such as breaks and inspections, that drivers must perform, it is superior to an 18-hour day. OOIDA noted that the adoption of both the 14 consecutive on-duty hours and 10 consecutive off-duty hours provisions has been helpful to some drivers in achieving a 24-hour schedule. OOIDA also noted that a 24-hour schedule is beneficial to a driver's overall safety and health on all performance measures. International Paper noted the importance of the circadian rhythms on a driver's health, physical condition, and alertness. They argued that such rhythms provide a strong rationale for the 34-hour recovery because a driver can take 10 hours of off-duty rest, take 24 hours off, and begin work at the same time, thereby following the circadian rhythm.

Others took issue with the Agency's effort to move towards a 24-hour cycle. For example, Public Citizen challenged FMCSA's statement regarding our effort at moving toward a 24-hour work cycle, providing drivers with sufficient time off to obtain 8 hours sleep, while preserving flexibility for carriers in meeting schedule demands. They asserted that no studies cited by the Agency suggest safety and driver health will be improved by ''moving toward'' requiring a 24-hour work cycle or that a backward-rotating 21-hour schedule is any improvement over a backward-rotating 18-hour schedule.

FMCSA Response

The following response addresses health and safety comments pertaining to interactions/offsets and the 24-hour cycle. In the 2005 NPRM, FMCSA asked for information on combined effects of the provisions (driving time, duty time, and recovery) on ''driver health, the safe operation of CMVs, and economic factors.'' In the 2005 NPRM and in today's rule, FMCSA treated health and safety impacts independently pursuant to the court's request. Specifically, in the 2005 NPRM, in addition to asking how health and safety may be related, we devote four sections and five separate questions to specific health concerns [70 FR 3344–3346]. AHAS asserts that we do not treat health and safety separately. The Court notes that while FMCSA must separately address driver health from safety, this does not ''suggest that the two factors are unrelated: Healthy drivers presumably cause fewer crashes and drivers who have fewer crashes suffer fewer injuries.'' AHAS seems to oversimplify the combined effects of these provisions that the court acknowledged.

Based on the studies, data, and comments, FMCSA believes those drivers who take 10 hours off-duty in tandem with the 14-hour driving window are more likely to maintain their 24-hour cycle compared to drivers utilizing the pre-2003 rule, thereby increasing the probability that drivers using today's rule are alert. The rule we are adopting today does not eliminate the possibility that drivers could utilize backward rotating schedules by combining driving and off-duty time; however, the new rule is an improvement for drivers' circadian rhythm over the 18-hour ''day'' possible under the pre-2003 rule. Specifically, today's rule moves drivers from an 18- to 21-hour driving time/off-duty cycle, which is far closer to a 24-hour cycle

than the pre-2003 rule achieved, and reduces the severity of a backward-rotating schedule. In addition, the combined effects of the various provisions, including adding 2 hours of daily off-duty time, utilizing a 14-hour non-extendable driving window, and removing the split sleeper berth provision, allow for more rest to drivers than was possible under the pre-2003 rule. The Agency also concludes that the health impacts between the 11 and 10 hours of driving are inconsequential.

As noted above, FMCSA is adopting the duty-tour and off-duty provisions first enacted in the 2003 rule. In the rule adopted today, the Agency further bolsters CMV driver health and safety by a new provision that eliminates the use of the split sleeper berth time to ensure that all drivers have the opportunity to obtain eight hours of consecutive sleep on a daily basis. While fatigue should be eliminated for most drivers on a daily basis, the recovery provision is adopted as a flexible safety net that will protect most drivers when fatigue is not eliminated on a daily basis. Moreover, despite potential risks from DE, today's rule neither causes or exacerbates those risks; therefore, the rule has no deleterious effects on CMV driver health. Based on the combined effects and interactions of provisions of today's rule, in the agency's best judgment, today's rule enhances the health and safety of CMV drivers.

J.12. Effective and Implementation Dates

Only one commenter, the Commercial Vehicle Safety Alliance (CVSA), addressed the issue of when the proposed HOS rule should become effective. CVSA asked FMCSA to provide enough time for enforcement agencies and industry to make the appropriate changes required by any change in the HOS rules. It stated that the 8-month implementation period allowed for the 2003 HOS rules was barely enough time.

FMCSA Response

Today's final rule is effective on October 1, 2005. The HOS rule adopted on April 28, 2003, became effective 30 days after publication, but drivers and motor carriers were required to continue complying with the previous regulations until January 4, 2004. That interval gave industry and enforcement officials a substantial amount of time to revise their HOS training materials, re-train personnel and, in some cases, reprogram computer equipment.

FMCSA cannot use a similar implementation procedure for this rule because the D.C. Circuit vacated the 2003 rule, and the statute re-instating it provides that the rule shall expire no later than September 30, 2005. Under Section 7(f) of the Surface Transportation Extension Act of 2004, Part V, the 2003 rule is automatically replaced when today's rule becomes effective. The Agency cannot retain, or require compliance with, the 2003 rule for an interim period while motor carriers, drivers, and the enforcement community prepare to deal with the new requirements adopted today.

FMCSA recognizes that neither enforcement agencies nor the motor carrier industry will be able to implement the new regulations immediately upon the notice effective date. Some States require legislative action to conform their HOS statutes to this rule, though others adopt FMCSA's safety regulations by reference. All States, however, will have to revise their enforcement manuals, re-program their computers, and retrain roadside enforcement personnel. Motor carriers face a similar challenge to revise their internal compliance procedures and re-train large numbers of drivers, dispatchers, and other staff. Therefore, prior to the effective date of today's final rule, the Agency will issue a policy statement announcing its expectations for compliance and enforcement during the first several months after it takes effect.

J.13. Electronic On-Board Recording Devices

Approximately 170 comments were submitted addressing EOBRs. Of these, 124 commenters expressed general opposition to the required use of EOBRs, while 46 commenters favored their use. Of the 122 drivers who discussed EOBRs, 34 of them (28 percent) were in favor of a rule requiring their use. Seven trucking and other industry associations lined up against an EOBR requirement, while two safety advocacy groups strongly supported such a requirement.

FMCSA Response

FMCSA has published an ANPRM (69 FR 53386, September 1, 2004) requesting information about factors the Agency should consider in developing performance specifications for EOBRs. As the Agency said in the preamble to that document, ''FMCSA is attempting to evaluate the suitability of EOBRs to demonstrate compliance with the enforcement of the hours-of-service regulations, which in turn will have major implications for the welfare of drivers and the safe operation of commercial motor vehicles.'' The ANPRM asked for comments and information, both on technical questions relating to EOBRs and about the potential costs and benefits of such devices. The Agency is actively collecting and analyzing data on the costs and benefits of EOBR use to industry. Beyond cost issues, developing rules or technical specifications for EOBR devices is a highly complex endeavor. In addition, such technology issues must be evaluated in the context of developing and implementing effective new compliance and enforcement policies. In short, the complexity of the technical and policy issues involved in EOBRs warrants a separate rulemaking effort. Therefore, comments on EOBRs are not addressed in this rulemaking. However, the EOBR rulemaking will consider alternative means to effect HOS compliance through that technology. FMCSA has provided copies of the EOBR-related public comments to the ongoing EOBR rulemaking docket (FMCSA–2004–18940). Any additional comments on EOBRs should be addressed to that docket.

J.14. Other Provisions

Exemption for Utility Service Vehicle Drivers

Complete exemption from the HOS rule for operators of utility service vehicles (USVs) was suggested in a comment from The Edison Electric Institute (EEI). Twenty-five other commenters, including utility companies, workers, and associations, supported EEI's arguments. These comments noted that Congressional committees have recognized a need for special treatment of the utility industry in the HOS rules, and stated that a number of State and local regulatory and emergency response agencies support an exemption. Commenters stated that, unlike other CMVs, USVs are driven only a fraction of the total time the vehicles are in use, so there is less potential for fatigue-related crashes. They typically are driven locally for a few hours a day or less, have low mileage, do not transport freight, and are used as mobile tools. These commenters argued that the special safety responsibilities and operating characteristics of the utility industry had not been considered in the rulemaking. They asserted that FMCSA had presented no evidence that including USVs in the rule would improve highway safety. Nor, they said, would an exemption for USVs impinge on the Agency's goals of improving safety for the commercial driving industry. The American Gas Association

argued that in the past FMCSA had failed to adequately consider utility industry arguments for exemption.

The Edison Electric Institute argued that crash rates were lower for USVs than for CMVs in general, for CMVs operating within 100 air-miles of their point of origin, and for all large trucks. EEI said that FMCSA had not shown that USVs operating during ''emergencies'' have a detrimental effect on safety. Seven commenters supported those comments. Three were utility companies whose own experience showed a low or negligible number of accidents caused by employee fatigue.

The Commercial Vehicle Safety Alliance opposed a broad exemption for USVs. CVSA argued that emergency situations were generally already addressed by other rules, and concluded, based on MCMIS data ''that the utility industry's safety record is no better than the rest of the trucking industry that is subject to the hours-of-service rules. In fact, one could argue that based on this data the utility industry is overrepresented in fatalities compared to other segments of the industry.''

FMCSA Response

FMCSA previously addressed exemption requests from utility companies, and has considered the issue again in this rulemaking. The Agency continues to believe that existing exemptions applicable to USVs provide a proper balance between operational needs and public safety. The regulations at 49 CFR 390.23 already provide an HOS exemption for USVs operating in local or regional emergencies. Some commenters noted that the types of ''emergencies'' cited by the utilities (*e.g.*, downed power lines) occur frequently. The Agency believes USV operators should, therefore, be able to adjust the work schedules of their employees to ensure that drivers who have not reached their maximum limits under Part 395 are available when needed to handle these recurrent ''emergencies.'' As for the relative safety of utility operations, compiled crash data for this group of drivers is not extensive enough to be conclusive.

Outside Scope of Rulemaking

Some comments to the docket discussed a variety of topics outside the scope of this rulemaking. For example, the National Ready Mixed Concrete Association (NRMCA) sought a change in the Part 395 definition of ''driving time.'' It stated that about 23 percent of the truck fleet in the ready-mixed concrete industry is composed of front-discharge mixers, which dispense concrete by means of a chute on the front of the truck. NRMCA stated that front-discharge mixer drivers are an anomaly with respect to the current definition of driving time. Operators of rear-discharge mixers have to exit the truck to dispense concrete from the rear, thus the time spent dispensing concrete is classified as on-duty, not driving. A key element of the front-discharge design is that the driver can remain in the driver's seat to operate the mixer controls. During this time on the job site, the driver is at the controls of the CMV, meaning that this time must be classified as on-duty, driving, but the driver is in fact not actually driving. To rectify this claimed misclassification of driving time, NRMCA recommended that FMCSA alter the definition of driving time to be ''all time spent at the controls of the CMV in operation on public roadways'' to more accurately capture ''on-duty, driving'' time versus ''on-duty, not driving'' time.

FMCSA Response

Because this issue was not raised for comment in the NPRM, the Agency lacks the information to evaluate the implications of the NRMCA proposal. In this rulemaking, FMCSA will take no action on this issue.

FMCSA may consider these topics for future rulemaking as appropriate.

Outside Jurisdiction of Agency

Several topics addressed by commenters are not within the statutory authority of FMCSA. The Agency has no jurisdiction over any shippers and receivers, except to enforce certain hazardous materials regulations adopted from its sister DOT Agency, the Pipeline and Hazardous Materials Safety Administration, formerly the Research and Special Programs Administration. FMCSA also has no authority to regulate a driver's pay or other compensation. The Agency has acknowledged potential problems involving shortages of truck parking space, and has worked with other agencies and organizations to address the issue. However, FMCSA has no authority over any public or private property used for parking. Because FMCSA does have jurisdiction over a CMV driver, the Agency may prohibit or limit the driver from parking the vehicle in certain situations, but the Agency cannot require anyone to allow parking.

Alaska HOS

Although not mentioned by commenters to this docket, FMCSA is aware that technical amendments (which do not require advance public notice and comment) are needed to correct inconsistencies in 49 CFR 395.1 (g) and (h) relating to HOS in the State of Alaska. Those sections have been revised to clarify the text in a manner consistent with current Agency policy and interpretation.

J.15. Legal Issues

Procedural Issues

Seven commenters, including two labor unions, three trade associations, and two advocacy groups, expressed disapproval of the approach FMCSA had taken in the NPRM. The Transportation Trades Department of the AFL–CIO asserted that the NPRM did little more than challenge outside groups to demonstrate that some other rule or combination of provisions would be less harmful than the vacated rule. The International Brotherhood of Teamsters (IBT) argued that the language of the NPRM indicated that FMCSA had no intention of complying with the Court of Appeal's mandate to revise the HOS rule, and was instead seeking to shift the burden of proof to the opponents of the rule. IBT asserted that the NPRM invited opponents, by submitting additional scientific information, to demonstrate that the rule did not adequately comply with the statutory requirements. Instead, to comply with the court's decision FMCSA should have reexamined the scientific data already in the docket and addressed directly the documented health effects of chronic sleep deprivation, such as increased sensitivity to insulin, and increased risk of heart disease, hypertension, and obesity. In particular, FMCSA should not have published the NPRM before the literature review being conducted by the Transportation Research Board was completed and incorporated into the rulemaking.

The National Association of Wholesalers and Distributors argued that the content of the NPRM failed to shed any light on the thinking of FMCSA, and that this was a misuse of the regulatory process. The American Bakers Association also strongly objected to the regulatory approach followed in the NPRM, which it characterized as an attempt to thrust onto the regulated community the Agency's responsibility to justify the regulatory initiative through extensive and detailed scientific and technical data.

Two advocacy groups, Public Citizen and Advocates for Highway and Auto Safety (AHAS), strongly disapproved of the approach followed in the NPRM on a number of grounds. First, according to Public Citizen, the Agency did not ''go back to the drawing board'' and draft a

new rule incorporating some of the best aspects of the 2003 rule, such as the shortened daily on-duty period, nor did it include safeguards from the old rule, such as the weekly driving hour limits. According to AHAS, ''[t]he notice neither provides any indication of what, if any, changes to the [April 2003] HOS regulations the Agency is considering, nor how it plans to resolve the issues raised in the Court's opinion.'' Because the notice did not narrow the possible issues or focus public comment on specific actions under consideration, AHAS argued, the notice ''is equivalent to an advance notice of proposed rulemaking, but does not rise to the level of a NPRM within the meaning of the Administrative Procedures [sic] Act (APA).''

Commenters also requested FMCSA to leave the record open so that useful data, such as the 2004 NHTSA crash data, could be provided. The Truckload Carriers Association (TCA) said that the short comment period had diminished its ability to provide evidence, and that keeping the docket open was essential. AHAS and Public Citizen asked that the Agency provide time for the public to examine and comment on the literature review being conducted by the Transportation Research Board (TRB) of the National Academy of Sciences.

FMCSA Response

Rulemaking as complex as this action would normally require several years to complete. The entire process had to be compressed into one year, because that was the time provided by Sec. 7 (f) of the Surface Transportation Extension Act of 2004, Part V. The Agency alluded to this dilemma in the NPRM and explained its effort to reconcile the requirements of notice and comment rulemaking with the realities of an expanding, time-consuming research program needed to address the issues raised by the court. ''In order to allow effective public participation in the process before the statutory deadline, FMCSA is publishing this NPRM concurrently with its ongoing research and analysis of the issues raised by the court. To facilitate discussion, the Agency is putting forward the 2003 rule as the ''proposal'' on which public comments are sought. This NPRM, however, asks the public to comment on what changes to that rule, if any, are necessary to respond to the concerns raised by the court, and to provide data or studies that would support changes to, or continued use of, the 2003 rule'' [70 FR 3339].

As the quotation marks around ''proposal'' indicate, the 2003 rule was merely the starting point of a research and rulemaking program to determine whether that rule could be reconciled with the *Public Citizen* decision. Most of the critical comments summarized above simply overlooked the fact that FMCSA did not have enough time in one year sequentially to complete its research on a wide variety of issues, prepare and publish an NPRM, accept and analyze comments, make necessary changes to the regulatory proposal, submit the draft for intragovernmental review, and publish a final rule. Instead, the Agency opted for a parallel process; the public was asked to comment on changes to the 2003 rule that might be needed to comply with the court's decision, while the research and analysis on driver health and other issues identified by the court went forward simultaneously. There is no principle of administrative law that requires an Agency to forswear the search for additional information in an NPRM; on the contrary, agencies always seek new information from commenters.

This parallel procedure is fully consistent with the requirements of the Administrative Procedure Act. The provisions of the 2003 rule that FMCSA has adopted in this rule were, of course, proposed in detail in the NPRM. To the extent revisions have been made, they are in response to issues raised in the NPRM. For example, the discussion of sleeper berths included the statement that ''FMCSA will consider a variety of possible changes to the sleeper-berth provisions, including but not limited to: * * * (2) allowing one continuous sleeper-berth period of less than 10 hours, such as 8 hours, to substitute for the otherwise minimum 10 hours'' [70 FR 3349]. After examining a variety of alternatives, the Agency adopted that very option. The NPRM also discussed the unique operational conditions affecting local or short-haul drivers and concluded that, ''[s]ince local short-haul drivers typically work daytime hours, they are much more likely to maintain regular schedules that are less intense than many long-haul drivers. Short-haul drivers are significantly less likely to be working 13 or more hours or to have irregular circadian patterns. Also, local short-haul drivers typically sleep at home every night in their own beds. Thus local short-haul drivers are much more likely to be getting the daily restorative sleep necessary to maintain vigilance'' [70 FR 3351]. The Agency's new regulatory regime for drivers of short-haul vehicles that do not require a CDL is strongly foreshadowed by these passages.

In the NPRM instructions we were particularly interested in how various provisions impacted different sectors of the industry as we considered our regulatory options. We specifically asked in our guidance for commenters to provide information on the current type of operations, including ''(a) whether your primary operations are short-haul (*i.e.*, operations limited to 150 miles or less, with drivers typically spending the night at home) or long haul.''

FMCSA has always allowed the docketing of information submitted after the comment period closes. The NPRM said that ''[c]omments received after the comment closing date will be included in the docket and we will consider late comments to the extent practicable. FMCSA may, however, issue a final rule at any time after the close of the comment period.'' The Agency accepted and read many comments filed after the closing date (March 10, 2005), and posted additional material to the docket as it became available.

Driver Health

Both Public Citizen and AHAS argued that the NPRM sought to create a misleading and improper focus on the vacated 2003 rule and the issue of whether that rule should be changed. Public Citizen found it unacceptable for FMCSA to frame the discussion regarding driver health as if the 2003 final rule was an acceptable baseline against which modifications should be judged. AHAS similarly argued that the proposal continued to promote the invalidated April 2003 HOS final rule, notwithstanding its wholesale rejection by the Court of Appeals.

Both argued that the NPRM also incorrectly sought to narrow the scope of the Agency's responsibility to safeguard driver health (Public Citizen) or tried to avoid distinguishing between safety effects and health effects, as the Court of Appeals had required (AHAS). They both accused FMCSA of seeking to address only injuries or health conditions directly related to the HOS regulations and operation of a CMV, not other workplace injuries or health conditions suffered by drivers. AHAS argued that the NPRM's focus should have been broader than driver injuries resulting from crashes or adverse health impacts attributable to the act of driving. In AHAS's view, the issue of fatigue, alertness, and safe driving was factually and legally distinct from the issue of the health, physical condition, and well-being of truck drivers, but throughout the NPRM driver health, safe operation, and economics were treated as inextricably linked factors whose effects could not be separated and dealt with individually.

Finally, both Public Citizen and AHAS argued that the NPRM failed to provide any scientific support for the crucial elements of the Agency's proposal. Public Citizen stated that the proposal ''flies in the face'' of scientific evidence. AHAS asserted that the NPRM contained ''not a scintilla of data and scientific evidence'' that FMCSA had produced and applied any information with which to assess and compare the health effects of the pre-2003 HOS rule and the health effects of the April 2003 HOS regulation. No scientific information had been placed in the rulemaking record showing that drivers obtained more sleep under the new rule than under the old rule; or that they were more alert and had less fatigue; or that the new regulation had discernible safety benefits. AHAS asserted that FMCSA could not satisfy its statutory responsibility to consider existing scientific literature by asserting, as it did in the NPRM, that ''[t]he implications of these studies are not always clear.'' AHAS concluded that the NPRM did not satisfy either FMCSA's legal burden or its statutory obligation, arguing that the Agency had not demonstrated in the NPRM ''any intention to actively engage in a rulemaking action that directly confronts the application of existing research on worker health and physical condition to appropriate amendment of the current HOS regulation. Moreover, the Agency has failed to address its legal and statutory duty to ensure that the regulations it promulgates does [sic] not have a deleterious impact on truck driver health, physical condition, and well being.''

FMCSA Response

The alleged deficiencies in the Agency's approach to driver health are answered by the discussion of that issue elsewhere in this preamble. FMCSA did not treat the 2003 rule as the baseline for analyzing driver health, as charged by Public Citizen. The Agency essentially used the pre-2003 regulations as the baseline. In any event, the effect on driver health of the HOS changes made in the 2003 rule proved to be inconsequential. As for AHAS's charge that FMCSA improperly linked health, safety and economic considerations, rather than dealing with them individually, the Agency is required by statute to consider the costs of any regulations it believes necessary, including those to protect driver health [49 U.S.C. 31136(c)(2) and 31502(d)]. Although the Agency ultimately determined that no such regulations were needed, the health data examined proved too uncertain to allow a reliable calculation either of the benefits or the cost of such a regulation. This is discussed more fully in section E.2, dealing with exposure to diesel exhaust.

Docketing Issues

Public Citizen stated that ''FMCSA has haphazardly provided only abstracts in the docket for a number of studies that the Agency cites in this rulemaking notice, citing copyright protection concerns. This is a completely illegitimate claim. FMCSA may not base any rulemaking on materials not made publicly available and open to public scrutiny and comment. To do so would be a violation of the transparency requirements of the Administrative Procedures [sic] Act (APA). * * * FMCSA may not rely for its decision on any study for which it has provided only an abstract.'' In a supplemental comment, Public Citizen identified 23 studies provided only in abstracts; five of these had been available in full in the docket of the 2003 rule. The group asserted that the 2003 docket made available many copyrighted documents, and added that this docket apparently had been modified to substitute an abstract for a paper that was originally part of the docket. AHAS also objected to the posting of abstracts, rather than complete copies, of some studies.

FMCSA Response

FMCSA placed abstracts of the copyrighted reports in the docket well before the close of the comment period. The abstracts identified the research under review by the Agency, summarized the conclusions of the authors, and supplied publication details. As FMCSA noted in correspondence responding to AHAS' concern over the abstracted reports, the full versions of the reports were readily available in the Library of Congress, the National Library of Medicine in Bethesda, and other sources such as university libraries. AHAS therefore could have obtained copies to review when those abstracts were docketed. FMCSA is not aware of any APA requirement that the Agency produce the complete text of copyrighted studies which are otherwise reasonably obtainable from other sources. Nonetheless, FMCSA has created a reading room where the copyrighted materials referred to in the NPRM may be examined [Department of Transportation, Nassif Building, 400 Seventh St., SW., Room 403, Plaza Level, Washington, DC].

K. Rulemaking Analyses and Notices

K.1. Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

Overview

The FMCSA received numerous comments regarding the economic impacts of the 2003 rule with regard to daily driving time, daily on-duty and off-duty periods, the recovery period, and combined economic effects. Today's preamble has discussed these comments separately as part of its individual discussions of those issues. As such, comments concerning the economic impacts of individual provisions will not be addressed in detail here. However, several comments were received regarding other cost impacts of the 2003 rule, as well as limitations of the models used in the 2003 regulatory impact analysis (RIA). See the RIA document in the docket for more details.

Several commenters stated that they would incur additional employee training costs if further changes were made to the HOS rules. Some also commented that they would incur software reprogramming and update costs due to their use of electronic logbook software. The FMCSA recognizes that today's rule will result in new costs to motor carriers to train their drivers and other employees. As such, the RIA prepared for today's rule estimated employee training costs to motor carriers and drivers as part of its estimate of the total costs. Details regarding these costs are included in the RIA summary that follows this discussion, as well as in the separate RIA, entitled ''Regulatory Impact Analysis and Small Business Analysis for 2005 Hours of Service Regulatory Options,'' contained in the docket. Regarding software costs, not enough information was available on overall use of electronic logbook software to explicitly estimate such costs to the industry. However, such costs are indirectly estimated in this rulemaking as part of estimating the dollar cost of record of duty status (RODS) paperwork burden to industry from today's rule. The Agency's paperwork burden document, entitled ''Supporting Statement for Driver Hours of Service Regulation,'' is contained in the docket.

Advocates for Highway and Auto Safety (AHAS) commented to the 2005 NPRM docket that ''the Agency failed to account for the increased risk of crashes as time-on-task commensurately increases in its final benefit-cost analysis' and Public Citizen commented that FMCSA's RIA made ''no attempt to take time-on-task into account.'' In

developing its RIA for today's rule, the Agency updated the sleep-performance model used to estimate the safety impacts of the 2003 rule. To incorporate the potential effects on safety in the most comprehensive way, the Agency used a commercially-available computer program called the ''FAST/SAFTE'' Model. This program is designed to take workers'' schedules and predict their level of performance at each point in time. These performance levels were then used to estimate changes in crash risks for those time periods when the simulated operations schedules showed that the truck drivers were at the wheel (and thus vulnerable to crashing). The FAST/SAFTE Model is able to predict changes in drivers' levels of performance caused by varying degrees of sleep deficits over recent days and weeks. In addition, it accounts for a driver's circadian rhythms, and predicts the degree to which performance is degraded by driving at certain times of day or in certain parts of a daily cycle. The disruptive effects of rapid changes in circadian rhythms are also taken into consideration. However, according to our research, all currently-available, peer-reviewed sleep-performance models, including the FAST/SAFTE Model, are limited in their ability to take time-on-task (TOT) effects explicitly into account. The Agency corrected for this limitation by adding an independent TOT multiplier to the results of the FAST/SAFTE model. Despite the limitations of the available data, as was noted earlier in this preamble, FMCSA addressed TOT effects in its modeling and did so by basing its TOT multiplier on data from the Trucks Involved in Fatal Accidents (TIFA) database [Campbell, K.L. (2005), p. 8], which examined the number of trucks involved in fatigue-related fatal crashes by driving hour.

Options Considered

After reviewing almost 1,800 written comments submitted in response to the 2005 NPRM, current safety research, and recently compiled industry operations data, FMCSA identified four regulatory options for detailed economic benefit-cost analysis.

- Option 1 is to readopt provisions of the 2003 rule, which allow up to 11 hours of driving within a consecutive 14-hour tour of duty; minimum consecutive 10 hours daily off-duty period, or alternatively allowing each 10-hour off-duty period to be split into two periods of at least 2 hours each, provided a sleeper berth is used and certain other requirements are met; and drivers to re-start their 60- or 70-hour on-duty count after 34 hours of consecutive off-duty time.
- Option 2 (today's rule), allows 11 hours of driving in a tour of duty, restricts the splitting of off-duty time in sleeper berths to ensure that there is one period of at least 8 hours and counts the shorter part of a split period against the 14-hour tour-of-duty clock; and allows drivers to re-start their 60- or 70-hour on-duty count after 34 hours of consecutive off-duty time.
- Option 3 does not allow more than 10 hours of driving or the splitting of off-duty periods, and requires 58 hours off before restarting.
- Finally, Option 4 is a variant on Option 3 that allows operators to restart the 7/8-day clock by taking a 44-hour off-duty period. It is intended to test whether the costs of a much longer restart or recovery period can be mitigated while keeping some of the presumed fatigue-reducing benefits of a longer break.

It should be noted here that Options 2 through 4 include the new short-haul regulatory regime, so there are no cost differences among the Options with regard to short-haul operational changes.

Baseline for the analysis. According to Office of Management and Budget (OMB) guidance in OMB Circular A–4, the benefits and costs of each regulatory alternative must be measured against a baseline. The OMB guidance to Federal agencies states that the baseline ''should be the best assessment of the way the world would look absent the proposed action.'' [Office of Management and Budget, Circular A–4, 2003]. In most cases this would be the current operating or existing regulatory environment, and the impacts of all regulatory alternatives must be measured against this baseline. FMCSA first consulted with OMB to ensure that the baseline chosen for this RIA, the current operating environment, was the most appropriate starting point for the RIA. In discussions with OMB, it was decided that the current operating environment prior to today's rule was the most appropriate baseline for this analysis for several reasons. Industry is currently operating under the 2003 rule and the RIA must provide an estimate of the marginal or incremental economic impacts of potential Federal regulatory changes for use by decision makers.

Please note, however, that the relative ranking of the options described and analyzed in the RIA would not be affected by the choice of a baseline. For example, although we believe that the 2003 rule is the most appropriate baseline for this analysis, it may also have been of interest to use the pre-2003 rule as a baseline for the analysis. Compared to the current analysis, using the pre-2003 baseline would have meant that the values for costs and benefits of each option would have changed, but their relative rankings would have remained intact, since the values for costs and benefits would have changed by the same amount under each option (as represented by the difference between the pre-2003 rule and the 2003 rule).

Using the pre-2003 rule as a baseline, however, may have affected the choice of options in one respect. For instance, if, using the pre-2003 baseline, the 2003 rule had negative net benefits that were larger than the positive net benefits seen under Option 2 using the 2003 baseline, then the net benefits of Option 2 relative to the pre-2003 rule would be negative, and adopting the pre-2003 rule would maximize net benefits. Fortunately, the Agency has already substantially evaluated the marginal economic impacts of the 2003 rule (a copy of which is contained in the docket), so the evaluation for today's rule could be considered in some respects the second phase of a two-phase evaluation of the economic effects between the pre-2003 rule and today's rule.

According to the 2003 RIA, the 2003 rule resulted in net benefits totaling $1.1 billion annually, relative to the pre-2003 rule. Since the adoption of the 2003 rule, however, the analysis of HOS regulations has advanced in a number of important ways that could have affected the regulatory impact analysis of the 2003 rule. In other words, had the agency fully updated the 2003 RIA using the latest available data and analytical methodology, it is probable that the net benefits would be different. For instance, the agency has included a substantial revision to the model to allow for TOT effects, and has explicitly accounted for shifting circadian rhythms resulting from a driver's schedule changes.

The agency concludes, however, that the net benefits of the 2003 rule relative to the pre-2003 rule would remain highly positive. This conclusion is based on several factors. First, the available data on risk since the 2003 rule was put in place indicates a lower crash risk, as the agency concluded in the 2003 analysis. Although these data are not comprehensive, many motor carriers have reported lower crash and injury rates under the 2003 rule, and preliminary FARS data indicates that fatigue-related fatal truck crashes have declined, both in number and as a percentage of all fatal CMV crashes.

Second, the RIA includes many analyses that are relevant for comparing

the 2003 and pre-2003 rules. In the RIA, Option 3 contains many of the provisions in the pre-2003 rule, most notably, 10 hours of daily driving and no restart provision. In addition, the agency ''stress tested'' the allowance of the 11th hour of driving in the sensitivity analysis described below. In that analysis, even assuming a greatly increased fatigue crash risk of driving in the 11th hour and other assumptions favoring the restriction of the 11th hour of driving, Option 2 is still the most cost-beneficial option. In other words, the agency very thoroughly analyzed the incremental impact of one of the most important differences between the pre-2003 and the 2003 rule, namely a 10 versus 11-hour daily driving limit, and concluded it was cost-beneficial to allow the 11th hour of driving.

For additional details the reader is referred to the stand-alone 2003 and 2005 RIAs contained in the docket.

Presented below is a summary of the net economic impacts of the alternative regulatory options considered (Options 2, 3 and 4), with the effects broken out by those impacting the long-haul (LH) sector and those impacting the short-haul (SH) sector. The costs of Option 1 (commonly referred to as the ''Status Quo'' option) are not discussed in detail here, as there would be no incremental cost or benefit changes relative to the baseline, or 2003 rule; however, if readers wish to examine the specific costs and benefits of Option 1 relative to the pre-2003 rule, they may refer to the 2003 RIA in the docket. Following this summary of net impacts are individual discussions of the costs and benefits associated with these Alternative Options.

Discussion of Net Effects

Figure 11 includes estimates of the net effects of the alternative options considered for this rulemaking.

FIGURE 11.—NET IMPACTS BY OPTION

Net Incremental Annual Costs, Benefits, and Net Costs of the Options Relative to Option 1
(Millions of 2004 dollars, rounded to nearest $10 million)

	Option 2	Option 3	Option 4
Total Annual—LH	30	2,140	1,390
Incremental Cost—SH	·280	·280	·280
Total Crash Reduction—LH	20	120	120
Benefits—SH	0	0	0
Net Annual Costs	·270	1,740	990

Note: LH = Long Haul; SH = Short Haul.

The analyses and figures presented below in detail under the Costs and Benefits sections of this discussion indicate that Option 2 would provide net savings relative to the baseline, or 2003 rule, while the other two regulatory alternatives considered here yield net annual costs.

Total net benefits of Option 2, as listed in Figure 11, are estimated at roughly $270 million annually. This total is comprised of $10 million in net costs to the long-haul (LH) sector (*i.e.*, $30 million in LH costs minus $20 million in LH safety benefits), offset by $280 million in annual net benefits to the short-haul (SH) sector.

Total net costs of Option 3 are estimated at approximately $1,740 million annually. This total is comprised of $2,020 million in net costs to the LH sector (*i.e.*, $2,140 million in LH costs minus $120 million in LH safety benefits), offset by $280 million in annual net benefits to the SH sector.

Total net costs of Option 4 are estimated at approximately $990 million annually. This total is comprised of $1,270 million in net costs to the LH sector (*i.e.*, $1,390 million in LH costs minus $120 million in LH safety benefits), offset by $280 million in annual cost savings or net benefits to the SH sector.

The differential economic impacts incurred by the LH and SH sectors of the motor carrier industry, as seen in Figure 11, are due to the nature of LH versus SH operations. Specifically, the 11th hour of daily driving, the recovery provision, and the split sleeper-berth provision are used almost exclusively by long-haul and regional operations, and as such, the costs of today's rule are concentrated in the LH sector. Meanwhile, the majority of benefits of today's rule accrue to SH operators by way of the new regulatory regime, which grants substantial paperwork savings and incremental productivity benefits to large portions of the SH sector.

Sensitivity Analysis for a 10-hour Driving Limit. In addition to examining options 2, 3, and 4 relative to Option 1, a variant of Option 2 was considered. This variant combined the other features of Option 2 with the 10-hour driving limit included in Options 3 and 4. This option was found to be considerably less cost-effective than the basic version of Option 2, as shown in the first row of Figure 12. Whereas Option 2 has net benefits of $270 million per year, the 10-hour variant has net benefits of negative $256 million per year (*i.e.*, it has net costs). The conclusion that imposing a 10-hour driving limit was not cost-effective was tested by reexamining costs and benefits under a series of sensitivity assumptions, which are shown in the other rows of Figure 12. Doubling the assumed use of the 11th hour increased the net costs of the 10-hour variant from $256 million to $782 million, making Option 2 with 10 hours driving even less cost effective relative to Option 2. More than tripling the value for each statistical life saved (from $3 million to $10 million) improved the relative cost effectiveness of Option 2 with 10 hours driving, but it was still neither cost beneficial on its own (with net costs of $170 million) nor cost effective relative to Option 2. Also, raising the relative risk of a fatigue-related crash in the 11th hour of driving by 1.4 times the value used in time-on-task (TOT) multiplier in the RIA did not make Option 2 with 10 hours driving cost effective relative to Option 2 ($232 in net costs versus $270 in net benefits respectively), nor did substantially raising the baseline level of fatigue in truck-related crashes (*i.e.*, $189 million in net costs for Option 2 with 10 hours driving relative to $287 million in net benefits for Option 2). Each change improved the showing of the 10-hour variant, but still left it with net costs rather than net benefits. Only in a very unlikely scenario that combines all three of the assumptions favorable to the 10-hour limit does the 10-hour variant show any net benefits. Even in this scenario, though, its net benefits are far below that of Option 2 without the 10-hour restriction, indicating that it is implausible that eliminating the 11th hour would be cost-effective.

FIGURE 12.—SENSITIVITY ANALYSES OF THE NET BENEFITS OF A 10-HOUR DRIVING LIMIT

[Millions of 2004$ per year]

	Net Benefits of Option 2	Net Benefits of Option 2 w/10 hrs
Basic Assumptions	270	·256
Twice as Much Use of 11th Hour	270	·782
Higher Value of Statistical Life (VSL)	291	·170
Higher TOT Impact	270	·232
Higher Baseline Fatigue	287	·189
Higher VSL, TOT Impact, and Baseline Fatigue	326	60

What follows is a detailed discussion of the marginal costs and benefits of the alternative regulatory options relative to the baseline.

Costs of the Alternative Options

This section presents the results of the cost analysis and includes estimates of the required changes in the commercial driver population as a result of impacts to long-haul operations.

Assessing Costs

The analysis of costs presented here recognizes that the different provisions within each option will affect carrier operations in complex and interacting ways. It also recognizes that these effects will depend strongly on the carriers' baseline operating patterns, which vary widely across this diverse industry. To produce a realistic measurement of each option's impacts, we divided the industry into broad segments, collected information on operations within these segments, and then created a model of carrier operations as they are affected by HOS rules. Because of the very wide array of operations, we have limited our analysis to the predominant parts of the industry.

Industry Segments Analyzed

The trucking industry is made up of distinct segments with different operating characteristics. As a consequence, HOS rules and changes in HOS rules will have different impacts on different segments. Figure 13 illustrates the division of the industry into its major segments.

FIGURE 13.—DIVISION OF INDUSTRY INTO MAJOR SEGMENTS

Long-Haul and Regional	Random	Regular		
	Random Truckload (TL)	Regular TL	Private Carriage	Less-Than-Truckload (LTL)
Short-Haul and Local				

The first major division within the industry is between long-haul and regional—what one can call over-the-road (OTR) trucking—and short-haul/local. The great preponderance of short-haul/local operations resemble ''normal'' employment, quite different from the working environment of the over-the-road driver. In short-haul/local operations, drivers work fairly regular schedules, return to their homes each night, and have the familiar weekends off. Because much of their on-duty time is for activities other than driving, they rarely, if ever, approach 11 hours of driving in a day. They do not use sleeper berths, and the restart provisions are not relevant to workers with regular weekends off. As such, impacts associated with potential changes to daily driving time, as well as the sleeper berth and restart provisions, are restricted to drivers and carriers operating in the regional and long-haul segments.

For analytical purposes, the major division in long-haul and regional trucking is between random and regular operations. The difference is critical because the two kinds of operation must be treated differently in the simulation model that is our principal analytical tool.

In random service, a company's trucks do not follow any fixed pattern. Following restarts at home, drivers pick up outbound loads near their home terminal and begin a road tour. Thereafter, the company's sales force does its best to find loads for the random drivers and keep them moving profitably until they complete their road tours and come home. Most road tours will last from one to three weeks.

The defining characteristic of regular service is that it operates on predictable schedules; both managers and drivers know, with a high degree of certainty, what they are going to be doing over a projected time period. Regular service entails regularly repeating patterns. These may be fixed patterns where trucks follow the same series of origin-destination pairs in the same sequence over the same time cycle. This could also be service from one or a few fixed origin points to a limited set of destinations in which loads are not moved over the same routes in a fixed sequence, but the operation is confined to that set of origins and destinations. Service like this can be planned for efficiency, and the planning can address driver-retention issues; regular drivers tend to spend familiar weekends at home.

Private carriage is regular; loads move from a fixed set of origins—the firm's factories and warehouses—to a fixed set of destinations—its own warehouses or stores or the warehouses and stores of its customers. Part of regular truck-load (TL) operation is outsourced private carriage—so-called dedicated service. In this kind of service, the TL firm's drivers will operate in the same way as a private carrier's drivers—they are doing the same kind of work. Other kinds of regular TL service are similar to dedicated service but with different contractual arrangements; the service is limited to a known set of origins and destinations and can be planned for efficiency and for driver retention. Many TL firms, especially the larger ones, have both random and regular operations.

Less-than-truckload (LTL) firms have two parts to their operations. They have local pick-up and delivery service in

which freight is taken out from a terminal to its ultimate destination and freight is picked up and brought into a terminal for movement over the road to another terminal where local service will take it to its destination. The over-the-road service among an LTL company's terminals is highly regular. Trucks make overnight runs between pairs of terminals. Most drivers will be home again by the next morning; in some cases they will sleep out one night and return the next night. Drivers are home for weekends. It is a highly planned operation.

Finally, in each of the OTR segments, there is a difference between solo and team-driving operations. For long-distance operations with high time sensitivity, pairs of drivers can substantially increase a truck's range per calendar day. The tradeoff is that team drivers cannot, on average, work as much as a solo driver.

Analytical Approach to Estimating Costs by Industry Segment

As noted above, for-hire TL operations are divided into ''random'' and ''regular'' segments. The impacts of different HOS rule options on the random group were measured using a simulation model. The Agency developed an Excel macro-driven spreadsheet model to simulate a CMV driver operating in compliance with hours-of-service (HOS) regulations. The model simulates how a CMV operator would behave, starting from his or her home terminal and making various stops to pick up and deliver shipments over a pre-defined duration. For further details on this model, the reader is referred to the stand-alone 2005 RIA in the docket.

We controlled for the prevalence of splitting sleeper berth periods by running cases in which the drivers either took advantage of their ability to split, or did not use that option even if it appeared to be beneficial.[3]

A year's worth of driving was simulated for each case, varying the intensity of effort and the typical length of haul for each option. The average number of hours per day of driving is the productivity measure used to compare the outputs from option to option. There are some random components to the analysis, which result in some uncertainty in the comparisons among options, but the effect of this uncertainty is minimized once several runs are combined.

Regular, for-hire TL operations are modeled in essentially the same way as private carriage. The same basic simulation model is used, but with different assumptions about patterns of operation. Its distinguishing features are more regular work schedules (in terms of repeating starting and ending times), more regular weekends off, and less time spent waiting for loads. The LTL portion of the industry is also modeled in this way; though almost all over-the-road LTL runs are overnight rather than during the day, the regularity of the schedules makes it reasonable to treat them like other regular drivers.

Team operations were treated separately for all of these segments because of the special way in which the options interact with their schedules. Team operations should be very little affected by the 34-hour restart, but could be substantially affected by restrictions on the use of split sleeper berth periods, and by the elimination of the ability to use the 11th hour as a buffer when the drivers aim at an average of 10 hours of driving per day. In addition, team operations will tend toward regularity and high utilization. As a result, team operations were more easily modeled off-line, concentrating on the effects of sleeper berth rules on driver alertness under a limited number of scenarios.

Measured Productivity Impacts of Options

Figure 14 shows the average percentage change in driving hours between Option 1 (status quo), Option 2 (today's rule), Option 3, and Option 4.

FIGURE 14.—ESTIMATED LOSS IN PRODUCTIVITY BY OPTION AND CASE

			Relative reduction in driving hour (percent)		
			Option 2 compared to option 1	Option 3 compared to option 1	Option 4 compared to option 1
Run characteristics					
For-hire, Random	*COM041*Using Split Sleeper Berths.	SR	1.1	24.9	10.3
		LR	5.9	26.2	19.4
		LH	·3.1	17.9	9.6
	No Split Sleeper Berths	SR	0	24.1	9.3
		LR	0	21.4	14.2
		LH	0	20.4	12.5
Regular Routes (Private TL, LTL, Regular For-Hire).	Full Weekend Off	Weekly Route	0	16.1	5
		Daily Route	0	·2.0	·1
	Six-Day Work Week	Weekly Route	0	29.2	19
		Daily Route	0	8.9	10
Team Drivers*	Using Split Sleeper Berths		0	5.0	5.0
	No Split Sleeper Berths		0	5.0	5.0

*These impact estimates were based on simplified scenarios rather than model runs.
Note: SR = Short Regional; LR = Long Regional; LH = Long Haul.

The impacts of Options 2, 3, and 4, relative to Option 1, varied widely across the runs. Some patterns were readily apparent, however. The impacts tended to be greater for drivers assumed to take advantage of split sleeper berths, for both short-regional (SR) and long-regional (LR) drivers. This effect is expected, given that Option 1 allows

[3] No use of the restricted split sleeper berth provision was assumed under Option 2 for the purposes of improving productivity. To the extent it is used, it can be expected to be used for convenience, with productivity consequences that would be difficult to assess.

drivers to enter their sleeper berths if they need to wait several hours before a load can be picked up or delivered. Because under Option 1 the use of the sleeper berth extends the 14-hour driving window, there are circumstances in which the drivers can be more productive, or can accept more advantageous loads. This use of the sleeper berth is more important if there are more waiting periods and less driving, which tends to be characteristic of operations with shorter lengths of haul. Thus, it is not surprising that the relative impact of not having the split break available is absent for the long-haul (LH) cases (and the positive effect of eliminating the split break for LH drivers can be attributed to random elements in the simulation procedure). Overall, the loss of the split break appeared to be of minor importance for the productivity of solo drivers. This observation is likely due to the fact that, while the opportunity to initiate a split break provides flexibility, the rules for using this feature imparts rigidity to a driver's schedule for subsequent tours of duty. For team drivers, we concluded that there was no necessary reason for a productivity impact from eliminating split break periods because two drivers alternating 10-hour driving periods can drive as much as two drivers alternating 5-hour driving periods.

The relative productivity loss caused by Option 3 is substantially greater than that for Options 2 and 4 in almost all cases. This pattern comes from the fact that the important difference between these options is the length of the restart period. For the random drivers, the lack of a regularly scheduled off-duty period means that a short restart can be very advantageous, especially for the hard-working drivers that were modeled. The exceptions to this trend can be explained by the reduced value of the restart in particular cases. The regular weekly and daily routes (which generally have a full weekend off), and team drivers (who share duty hours each day) do not need to restart because their cumulative 8-day on-duty totals do not reach 70 hours. Finally, it should be noted that the one case of a negative measured impact of Options 3 and 4 is the result of the random elements in the simulation procedure, and would not be expected to persist if these runs were repeated a large number of times.

Looking at the last two rows of Figure 14, or those operations involving team drivers, we see that in all cases, the team drivers were expected to lose 5% of their productivity as a result of adopting either Option 3 or 4. This results from the loss of the 11th hour of driving. This impact could occur despite the fact that teams are not expected to use more than 10 hours per day per driver on average. Without the possibility of driving into the 11th hour, the only way to average 10 hours of driving per day is for each member of the team to drive exactly 10 hours per day. Because rest stops are found only at discrete points along the highway, though, it will generally be impractical to stop exactly at 10 hours—meaning that drivers will generally have to stop before 10 hours have elapsed in order to avoid violating the 10-hour limit.

Weighting of the Individual Runs

Because the impacts of the options in the individual runs vary so widely, it was important to find the weighted average impacts across the runs, rather than relying on unweighted averages or simply presenting the range. The weighting procedure was based, in the first instance, on estimates of the fraction of total vehicles miles traveled (VMT) accounted for by each operational pattern. For example, teams account for about 9 percent of total LH VMT, and LTL over-the-road operations account for another 5 percent. The remaining VMT are split about equally between for-hire and private fleets. We found that about 60 percent of for-hire TL VMT can be considered random as opposed to regular, and that within the random component long regional and long haul operations are of greater magnitude than shorter operations. We also found that somewhat more than half of for-hire operations, and somewhat less than half of private fleet operations, are intensive enough to press the HOS limits and should therefore be affected by changes in those limits.

In addition to representing the typical patterns in the industry, however, it was important that the modeling reproduce the usage of the important features of the HOS rules that differ between the options. To ensure that the weighting resulted in an accurate reflection of the use of these features (and realistically measured the impacts of the options), the weights reflected, in part, data such as that shown in Figure 15 (see stand-alone 2005 RIA for details).

FIGURE 15.—USE OF THE 11TH DRIVING HOUR

[Use of the 11th hour by run]

			Percentage of tours with more than 10 hours of driving in option 1 (percent)
Run characteristics			
Random Truckload	Using Split Sleeper Berths	Short Regional	0
		Long Regional	10
		Long Haul	21
	No Split Sleeper Berths	Short Regional	0
		Long Regional	11
		Long Haul	28
Regular Service (Regular TL, Private Carriage, LTL).	Full Weekend Off	Weekly Route	31
		Daily Route	55
	Six-Day Work Week	Weekly Route	29
		Daily Route	34
Team Drivers	Using Split Sleeper Berths		50
	No Split Sleeper Berths		50

Source: Results of ICF Modeling.

Weighted Productivity Impacts of the Options

The weights used in the modeling are shown in the middle column of Figure 16 under ''Weight.'' This table also shows each operational type's contribution to the nationwide weighted impact, which is calculated by multiplying the relative impacts in Figure 14 by the weights in Figure 16.

The sums of these weighted contributions are also shown at the bottom of Figure 16. Option 2 was found to reduce average driver productivity by only 0.042 percent, while Option 3 reduced average driver productivity over 7.1 percent. Option 4 was found to have an impact between Options 1 and 3, at 4.6 percent.

The cost impact of these changes in productivity was calculated by adapting the same methodology that was applied for the 2003 RIA for the 2003 rule, updated to 2004 dollars (see the stand-alone RIA for details). Using that methodology, two main types of costs were considered: Labor (or driver) costs and non-driver costs. Each is explained in more detail below.

Labor (Driver) Costs

A significant portion of the cost resulting from changes in productivity was estimated to be driver-related labor cost changes. That is, changes in the HOS options were first translated to changes in drivers' labor productivities that were then used to calculate changes in the number of drivers needed. Changes in the number of drivers were then translated into labor cost changes using an estimated ''wage vs. hours worked'' functional relationship for truck drivers. Details of the regression model used for this are explained in the Appendix of the stand-alone RIA.

FIGURE 16.—WEIGHTED LOSSES IN PRODUCTIVITY

Weighted changes in LH productivity by option and case						
			Weight (percent)	Option 2 impact (percent)	Option 3 impact (percent)	Option 4 impact (percent)
Run characteristics						
For-hire, random	Using split sleeper berths	SR	0.5	0.01	0.14	0.06
		LR	1.2	0.07	0.32	0.24
		LH	1.2	·0.03	0.21	0.11
	No split sleeper berths	SR	2.4	0.00	0.57	0.22
		LR	4.9	0.00	1.05	0.70
		LH	4.4	0.00	0.89	0.55
Regular routes (private TL, LTL, regular for-hire).	Full weekend off	Weekly	6.9	0.00	1.11	0.32
		Daily	7.9	0.00	·0.15	·0.06
	Six-day work week	Weekly	5.9	0.00	1.73	1.15
		Daily	8.9	0.00	0.79	0.88
Team drivers	Using split sleeper berths		4.5	0.00	0.23	0.23
	No split sleeper berths		4.5	0.00	0.23	0.23
Unaffected (due to less-intense schedules)			45.1	0.00	0.00	0.00
Total			100.0	0.042	7.12	4.61

Note: SR = Short Regional; LR = Long Regional; LH = Long Haul.

Non-Driver Costs

Another part of the direct cost effects of the HOS options were related to the non-driver changes necessary as a result of the changes in the number of drivers. Several categories of non-driver costs were estimated as follows:

- Non-Driver Labor
- Trucks
- Parking
- Insurance
- Maintenance
- Recruitment

Analysis performed originally for the 2003 RIA and reviewed again for this rulemaking revealed that a 1 percent change in labor productivity translated to approximately $275 million (in 2000 dollars) or $298 million (in 2004 dollars).[4] Multiplying the costs per 1 percent decrease in productivity by the weighted average productivity losses associated with Options 2, 3 and 4 and outlined in Figure 16, we see the following results.

The productivity impact of implementing Option 2, which was estimated to result in a productivity loss to industry of 0.042 percent, yields $13 million per year in direct productivity costs (*i.e.*, 0.042 multiplied by $298 million). As shown in Figure 16, Option 3 was estimated to reduce industry productivity by 7.12 percent. The result is total annual costs to industry of $2.12 billion (or 7.12 multiplied by $298 million). The productivity cost of implementing Option 4 was estimated at approximately $1.374 billion (or 4.61 multiplied by $298 million).

Retraining Costs

Because several commenters to the 2005 NPRM provided data on the potential costs to re-train drivers and other personnel, we added this to the other non-driver cost components discussed above. Using the total re-training costs provided by the commenters, we estimated a cost per driver based on the number of drivers for these companies. These ''unit costs'' varied between $75 and $150 per driver. The wide range is due to the variability in the level of detail provided by different companies. In particular, some companies did not make it clear whether the costs they estimated were only for driver re-training or if they included other non-driver staff re-training as well. For details about these re-training costs, the reader is referred to the docket, with particular reference to comments submitted by McLane Company, Inc., Williams Trucking, Brink Farms, and CR England.

The lower end of the cost range was reported by C.R. England, and it appeared to have estimated only driver re-training costs. The Agency decided that this may be too low if training for

[4] The factor for scaling costs from year 2000 dollars (as used in the 2003 RIA) to year 2004 dollars (for this document) is 1.0824, based on the ratio of GDP deflator values for these two years from Bureau of Economic Analysis National Income and Product Accounts (NIPA) tables.

both drivers and supporting staff were necessary. As a result, we assumed $100 per driver as a reasonable point estimate for the re-training costs. We assumed these costs to be in 2004 dollars.

Using a 7 percent discount rate, 10 years as the amortization period, and three million total truck drivers (Bureau of Labor Statistics, Current Population Survey), we calculated the annualized re-training costs to be $21 million in 2004 dollars. While retraining costs may in fact vary somewhat by Alternative Option, the RIA for today's rule has taken these costs as constant, for a simple analysis. For instance, while it might be the case that certain carriers would only retrain their LH drivers who currently use the sleeper-berth provision, it may also be the case that some carriers would want to train their entire driver workforce, depending on how many drivers do, or might, use the sleeper berth provision. For this reason, we assumed constant costs for driver retraining. As such, retraining costs for Option 2 could be considered conservative, in that they may be an overestimate of true retraining costs. Also, it must be noted that while we expect motor carriers to incur any driver/employee retraining costs associated with today's rule within the first year of the rule's implementation, we have spread these costs out over a 10-year period and discounted them back to present year values for reporting purposes (*i.e.*, so as to present total cost figures as a single ''average annual cost'' estimate).

Total Costs

As seen in Figure 16, implementation of Option 2 (today's rule) entails total annual costs of $34 million, which is composed of $13 million in direct productivity losses and $21 million in driver training costs.

Implementation of Option 3 would entail total annual costs of $2.142 billion, or $2.121 billion in direct productivity losses and $21 million in driver training costs.

Implementation of Option 4 would entail total annual costs of $1.395 billion, or $1.374 billion in direct productivity losses and $21 million in driver training costs.

FIGURE 17.—TOTAL ANNUAL COSTS BY OPTION

Incremental Annual Costs of the Options for LH Operations Relative to Option 1

	Option 2	Option 3	Option 4
Change in LH Productivity	0.042%	7.12%	4.61%
Change in Annual Costs Due to Productivity Impact (millions of 2004$)	$13	$2,121	$1,374
Incremental Annualized Retraining Cost (millions of 2004$)	$21	$21	$21
Total Annual Incremental Cost	$34	$2,142	$1,395

Source: ICF analysis.

Other Costs

As discussed earlier in this preamble, FMCSA conducted an extensive literature review examining the potential health effects of changes in the hours of service rules to commercial drivers. However, following this review, the Agency concluded that neither the current data nor the peer-reviewed research findings published to date were sufficient to allow the Agency to quantify and monetize any marginal acute health impacts to commercial drivers from today's rule. As a result, such impacts were not incorporated into the cost and benefits estimates developed for the RIA accompanying today's rule.

Increases in Long-Haul Drivers Needed

We are assuming that, because the same total ton-miles of freight will need to be transported under all three options, the reductions in productivity can be translated directly into percentage increases in the number of drivers. Thus, Option 2 (today's rule) would require an additional 0.042 percent of 1.5 million long-haul drivers. The result is that the industry will need to hire about 600 additional drivers as a result of changes implemented as part of today's final rule. If Option 3 were to be implemented, it would result in a need for 107,000 additional long-haul drivers (or 7.12 percent of 1.5 million). If Option 4 were to be implemented, it would result in a need for 69,000 additional long-haul drivers (or 4.61 percent of 1.5 million). These estimates would be reduced somewhat if the effect of productivity changes on mode choice (i.e., if freight were to shift to rail as a result) were taken into account; thus, they can be assumed to represent upper bounds on the required increase in drivers.

Benefits

Two types of benefits were estimated as a result of today's rule. These include safety benefits to long-haul operations and non-safety benefits to short-haul operations as a result of changes in the maximum daily driving time (*i.e.*, under Options 3 and 4), the recovery provision (*i.e.*, under Options 3 and 4), and the split sleeper berth exemption (*i.e.*, under Options 2, 3, and 4). Recall from the discussion in the costs section that short-haul drivers were determined to be largely unaffected by the changes in these provisions, given that they rarely, if ever, use these provisions in their day-to-day operations. As such, any safety impacts to short-haul operations were determined to be minimal. The second type of benefits estimated were non-safety benefits to short-haul operations as a result of the new short-haul regulatory regime implemented in today's rule. These benefits accrue by way of relief from the RODS completion burden for many drivers within this segment, as well as slight productivity benefits from use of a second 16-hour day.

Safety Impacts

FMCSA estimated the benefits of the HOS alternatives to long-haul operations using a multi-step process to relate changes in HOS rules to changes in crashes. Conceptually, FMCSA took the following steps for each alternative:

(1) Constructed a set of sample working and driving schedules of different intensities and degrees of regularity;

(2) Used the results of the modeling performed for the cost analysis to determine the percentage of drivers following each sample schedule, and determined the shifts in these percentages caused by different HOS alternatives;

(3) Translated the amount of on-duty time in each schedule into expected amounts of sleep, using a function based on Effects of Sleep Schedules on Commercial Motor Vehicle Driver Performance (Walter Reed Army Institute of Research) [Balkin, T., *et al.* (2000)];

(4) Used the FAST/SAFTE Sleep Performance Model to estimate the effects of different sleep and driving schedules on a measure of alertness;

(5) Translated changes in alertness into relative changes in crash risk, based on a driving simulator, and adjusted certain estimates upward through use of a time-on-task multiplier for those crash risks associated with longer driving schedules;

(6) Calibrated the results of the simulated crash risk modeling to the real world using independent estimates of the total numbers and percentages of crashes attributable to fatigue; and

(7) Translated the estimated changes in fatigue-related crashes into dollar values for avoided crashes using existing estimates of the damages from fatal, injury, and property-damage only crashes.

Safety Benefits

The quantified and monetized safety benefits of the options are derived from their effects on truck crashes in the long-haul sector. Changes in work and sleep schedules of long-haul drivers due to the HOS alternatives can be translated into relative changes in modeled fatigue-related crashes, and can be calibrated to correspond to independent estimates of numbers of fatigue-related crashes. The damages from fatigue-related crashes can be projected for each of the alternatives.

Changes in Crash Damages Due to Schedule Changes

As discussed earlier in this preamble, analysis of TIFA data over an 11-year period reveals that fatigue-related crashes are a significant problem in long-haul operations. This fact can be attributed in part to the relatively heavy work schedules of long-haul drivers, but also to the fact that long-haul operations are much more likely to subject drivers to irregular and rotating schedules. In this analysis, FMCSA estimated that all of the alternative regulatory options considered here (Options 2, 3, and 4) would reduce crashes relative to the current rules with full compliance. However, there are differences in the relative effectiveness of these three alternative options, which differ in terms of their allowance for improved rest during the workweek.

Reductions in crash risks under all three alternative options are expected to result from longer and more consolidated periods of rest; and under Options 3 and 4, additional reductions are expected to result from a combination of increased rest at the end of a work week (or similar multiday period), and shorter maximum driving periods. These effects can be complex and subtle, and can interact with each other and the range of schedules in the industry under different options. To incorporate these potential effects on safety in the most comprehensive way, we ran the on/off-duty schedules resulting from the simulation modeling through a commercially available computer program called FAST/SAFTE. This program is designed to take workers' schedules and predict their level of performance at each point in time. These performance levels were then used to estimate changes in crash risks for those time periods when the operational simulation showed that the truck drivers were at the wheel (and thus vulnerable to crashing). FAST/SAFTE, which was calibrated using the results of the Walter Reed laboratory study of truck drivers, is able to predict changes in drivers' levels of performance caused by varying degrees of sleep deficits over recent days and weeks. In addition, it accounts for a driver's circadian rhythm, and predicts the degree to which performance is degraded by driving at certain times of day or certain parts of a daily cycle. The disruptive effects of rapid changes in circadian rhythm are also taken into consideration. The model yields output in terms of psychomotor vigilance test (PVT) scores, which were found in previous work to be related to changes in driving performance.

Because of research that points to significant time-on-task (TOT) effects, and empirical evidence that fatigue-related crashes rise as a percentage of total crashes after long hours of driving, we have added an independent TOT multiplier to the results of the FAST/SAFTE model. This multiplier is to TIFA data [Campbell, K.L. (2005), Figure 7, p. 8]. While the TIFA data do have limitations, as discussed earlier in this preamble, based on our knowledge they represent the only recently-published data available for considering such effects. The Campbell data, relative to the other studies, also show a relatively high increase in risk in the 11th hour of driving, although all of the studies acknowledge a large degree of uncertainty. In the face of this uncertainty, the agency felt it prudent to use a study that shows a higher risk, in order to ensure that the model does not underestimate the risk of driving in the 11th hour. In addition, the agency further tests the robustness of our conclusions by performing a sensitivity analysis which assumes an even larger TOT effect in the 11th hour, which is described in more detail earlier in this section of the preamble, as well as in the stand-alone RIA contained in the docket.

In order to use the FAST/SAFTE model to process the outputs of the operational model, we needed to determine how much sleep the drivers were getting and when that sleep would occur during given off-duty periods. We estimated quantities of sleep for drivers using data from the Walter Reed field study, which provided actual sleep amount and hours worked for drivers in that study. The total sleep hours were plotted against total on-duty hours for each 24-hour period, revealing a general negative relationship between daily hours worked and total daily sleep amount. A cubic regression function was then fitted to the data, which was then used to predict sleep given modeled numbers of hours on duty. Assumptions were also made that drivers avoid sleeping in very short off-duty periods, try to consolidate their sleep toward the end of their daily off-duty periods, but awaken at least a half hour before starting to drive (to avoid the effects of sleep inertia).

Crash Risk Results by Operational Case

The results of the crash risk modeling are presented in Figure 18, after scaling the results to yield an average fatigue-related value of 7 percent in Option 1. This scaling was performed to incorporate the beneficial effects of the 2003 rule on fatigue-related crashes, as estimated in the RIA for that rule. Overall, the impacts are relatively small, as might be expected for options that are making marginal changes to the 2003 rule. Some patterns are visible: in almost every case, Options 2, 3, and 4 show lower crash risks than Option 1. In most cases, the crash risk reductions were greater for six-day schedules than for five-day schedules.

Options 3 and 4 have generally greater reductions in risks (shown as negative numbers) than Option 2, as is expected due to the greater stringency of those options. Impacts on team drivers, which were modeled as being the same for Options 3 and 4, were greater for drivers who split their rest periods under Option 1 than for those who did not.

FIGURE 18.—DETAILED CRASH RISK ESTIMATES

			Relative change in crash risk (percent)		
			Option 2 compared to option 1	Option 3 compared to option 1	Option 4 compared to option 1
Run characteristics					
For-hire, random	Using split sleeper berths	SR	·7.4	·6.3	·2.4
		LR	1.4	·5.6	·7.5
		LH	2.0	·7.2	·7.6
	No split sleeper berths	SR	0	1.1	5.0
		LR	0	·6.9	·8.9
		LH	0	·9.3	·9.6
Regular routes (private TL, LTL, regular for-hire).	Full weekend off	Weekly	0	0.2	·0.4
		Daily	0	·0.7	·0.3
	Six-day work week	Weekly	0	·0.7	·1.2
		Daily	0	·0.9	·0.5
Team drivers[5]	Using split sleeper berths		·5.7	·6.4	·6.4
	No split sleeper berths		·0	·0.7	·0.7
Weighted average impacts (raw)			·0.3	·1.4	·1.4
Weighted average impacts (scaled)			·0.1	·0.6	·0.6

Weighting the crash risk results in the same manner as the productivity results, we found the overall reductions in crash risk associated with Options 2, 3 and 4 to be relatively small compared to the baseline. For instance, under Option 2, the weighted reduction in crash risk across all regional and long-haul operational types was equal to 0.1 percent. For Options 3 and 4, the weighted reduction in crash risk across all operational types equaled approximately 0.6 percent.

Value of the Crash Risk Changes

The above percentage changes in crash risk were valued by multiplying them by an estimate of the total annual damage associated with long-haul and regional truck crashes. A recent analysis of total large truck crash damages estimated the average annual cost at $32 billion in year 2000 dollars, or about $34.6 billion in year 2004 dollars. Research was conducted for this 2005 RIA to separate the percentage of total crash-related damages that were caused by the long-haul segment of the industry. Results revealed that the long-haul segment was involved in approximately 58 percent of the total damages associated with large truck-related crashes. Therefore, applying this 58 percent to $34.6 billion yields approximately $20.1 billion in crash damages for which the long-haul segment is responsible.

Applying the estimated reductions in crash risk due to Option 2 (i.e., 0.1 percent) to the $20 billion in crash damages involving the long-haul segment yields a total safety benefit from Option 2 (today's rule) of roughly $20 million per year (or 0.1 multiplied by $20.1 billion). The risk reduction attributable to Options 3 and 4 is equal to $120 million per year, or the crash risk reduction for Options 3 and 4 (0.6 percent) multiplied by $20.1 billion.

Time Savings and Productivity Benefits to Certain Short-Haul Drivers

Recall that today's rule effectively provides relief from the previously defined filing requirements for particular segments of the short-haul sector. This involves certain commercial drivers operating vehicles with a gross vehicle weight rating (GVWR) of less than 26,001 pounds, who return to their primary duty station each day and whose range of operations is within a 150 air-mile radius. Not all drivers meeting these criteria would be provided relief as a result of today's rule because some already engage in operations that do not require a logbook.

Figure 19 outlines the types of short-haul drivers of vehicles below 26,001 pound GVWR that would potentially be affected by today's rule and explains which of these cases stands to accrue benefits as a result of paperwork savings. Additionally, Figure 19 presents the dollar estimates of these savings. Specifically, as the Figure shows, analysis of the rule, especially of the change in the logbook exemption, requires consideration of three different cases for operations under the current rule:

- Driving inside the 100-mile range and choosing not to keep a log;
- Driving inside the 100-mile range and choosing to keep a log; and
- Driving in the 100–150 mile range, where logs currently are required.

Safety effects of the second 16-hour exemption are not reported in the Figure or discussed further in this paper because, as noted in the safety impacts discussion of today's rule, they were estimated to be minimal. Based on analysis conducted in the 2003 RIA, it was estimated that the reduction in safety benefits caused by these safety effects would be well below $10 million per year.

[5] These impact estimates were based on simplified scenarios rather than model runs.

FIGURE 19.—TYPES OF POTENTIALLY AFFECTED SHORT-HAUL DRIVERS

[Annual savings in millions, rounded to the nearest $10 million]

	Case 1	Case 2	Case 3	Total annual savings ($ millions)
Description	Now operating within 100-mile range and not keeping logs. Duty tours ≤12 hours.	Now operating within 100-mile range and keeping logs. Duty tours up to 14 hours.	Now operating in 100 to 150 mile range. Must keep logs and observe 14-hour limit.	
Logbook effects	No effect: Already exempt from log requirement. Case-1 benefit: $0.	Relieved from log requirement. Case-2 benefit: $100.	Relieved from log requirement. Case-3 benefit: $40.	$140
Logbook exemption	May use 14-hour tour now, if they keep log. Log cost is $2.00/day. Tour >12 hours of little value to this group. Benefit: Minimal.	Already choosing logbook and 14-hour tour. Benefit: $0.	Already have 14-hour tour	0
Second 16-hour day	Case-1 trucks would not use the 16-hour day because they already choose not to use the 14-hour tour. Savings: $0.	Analysis is an extension of analysis of second 16-hour day that was done for the 2003 RIA. This approach did not distinguish between cases 2 and 3		140
				280

Overview of Short-Haul Impact Analysis

In the 2003 RIA, the Agency estimated the savings from a second 16-hour day (*i.e.*, under the ''ATA Option''). We have used that figure as the basis for our current estimate, adjusting for inflation and the number of affected drivers. Both for the second 16-hour day and the logbook exemption, we had to estimate the number of truck-days that would be affected.

A truck-day is the relevant unit, because the magnitude of effects of both logbook and 16-hour exemptions depends on the number of days on which they are used. In effect, a truck-day is the same as a driver-day. This is based on the premise that, on any given day, each truck in use has one driver. This is virtually always the case in over-the-road trucking (except for teams); it is also the case for short-haul operations. One could imagine cases in which two different construction workers drive the same truck on the same day or one worker uses two different trucks, but we expect such cases to be rare and likely to cancel each other out.

Details of Analysis

For estimating truck-days, the starting point is the Vehicle Inventory and Use Survey (VIUS) from the 2002 Economic Census. Table 4 of the VIUS survey provides the number of 10,000- to 26,000-pound trucks (10–26 trucks) in each of the reported operating ranges. Each truck in the survey is assigned to an operating range on the basis of respondents' statements about the range in which the truck runs the most miles. The table shows that 2.24 million 10,000- to 26,000-pound trucks are assigned to all operating ranges. This number is converted to truck-days for our purpose in a series of steps discussed in the stand-alone 2005 RIA. The result of the various steps and adjustments is 1.68 million truck-years on the basis of actual use of 10,000–26,000 pound GVWR trucks within 150 miles. This figure is the basis of our benefit estimates for both the logbook exemption and second 16-hour day.

For the logbook savings, truck-years are converted to truck-days (driver-days) with two factors. First, we assume the average driver works 48 weeks a year, allowing for vacations, holidays, and sick days. Second, on the basis of an analysis of survey data on daily and weekly hours of work for a sample of short-haul drivers, we use 5.5 days worked per week for the average short-haul driver. The next steps in the benefit calculation for the logbook exemption involve the two types of drivers known as ''Case 2'' drivers (those operating within a 100-mile radius but using logs) and ''Case 3'' drivers (those operating in the 100–150 air-mile radius who were previously required to keep logs). Under Case 2, we have estimated 1.61 million truck years and for Case 3, we have estimated 73,000 truck years, which results in the total of 1.68 million truck years mentioned previously.

For Case 1 drivers, or those who currently do not keep logs and stay within the 12-hour limit, there is a chance that some would choose to keep logs in order to be able to extend their tours beyond 12 hours. We have found, however, that any driver with a need to extend a tour even a fraction of an hour beyond the 12-hour limit would have already found (*i.e.*, under the 2003 rule) that it would be worthwhile to keep a log to secure that increase in productivity. We based this conclusion on the fact that keeping a log for a day imposes a cost of only about $2, whereas the increased productivity of a driver able to work another 15 minutes has a value of that same small magnitude. Cases in which drivers would choose to extend their tours of duty as a result of today's rule would be limited to those few cases in which very short extensions were desired. Furthermore, the added savings from these cases can be shown to be quite small. Thus, we concluded that the savings from drivers in Case 1 would be minimal and have left these savings out of the analysis.

Time Savings Benefits for Each Case

For Case 2 operations, we have to estimate the number of trucks operating inside 100 miles and choosing to keep logs. For this purpose, we rely on the FMCSA field survey. In the survey, 10.4 percent of short-haul drivers reported tours of duty longer than 12 hours. We assume these drivers were keeping logs; thus, we estimate that 10.4 percent of 0- to 100-mile drivers (1.61 million, after rounding) are using logbooks. With this factor, and our assumptions of 48 weeks per year and 5.5 days per week, we arrive at 44,215,000 truck-days for which a logbook would not have to be completed as a result of today's rule. We convert this to dollars using the following estimates (originally developed for the 2003 rule): 9.5

minutes to do the log, $12.62/hour for the driver's wage, and an inflation adjustment for 2004 dollars. The result is a stream of annual savings of $95.6 million, which we have rounded to $100 million.

For Case 3, the same procedure is followed with one exception. All Case-3 trucks (73,000) are now keeping logs, so there is no need to adjust for those not keeping logs, as was done above with Class 2 drivers. The result is 19,340,000 driver-days for which a logbook would not have to be completed. Monetizing this benefit using the above wage rate and time savings figure, the result is an annual stream of savings of $41.9 million, which we have rounded to $40 million.

Summing the benefits from Case 2 and Case 3 operations yields total annual time savings benefits of $140 million. This total represents the time savings associated with today's rule, which will exempt Case 2 operations (trucks/drivers operating within a 100 air-mile radius and keeping logs) and Case 3 operations (trucks/drivers operating between 100–150 air-mile radius and keeping logs) from the logbook requirement.

Benefits from the use of the first 16-hour day were originally estimated in the RIA for the 2003 rule, and were found to equal approximately $470 million annually. A calculation using the same methodology showed that the savings from a second 16-hour day in each week would be about one-quarter as great. Thus, for 1.5 million short-haul drivers, annual savings are estimated at $118 million (in year 2000 dollars). Updated to year 2004 dollars (to adjust for inflation over this period), the result is an annual savings stream of $143.3 million, which we have rounded to $140 million.

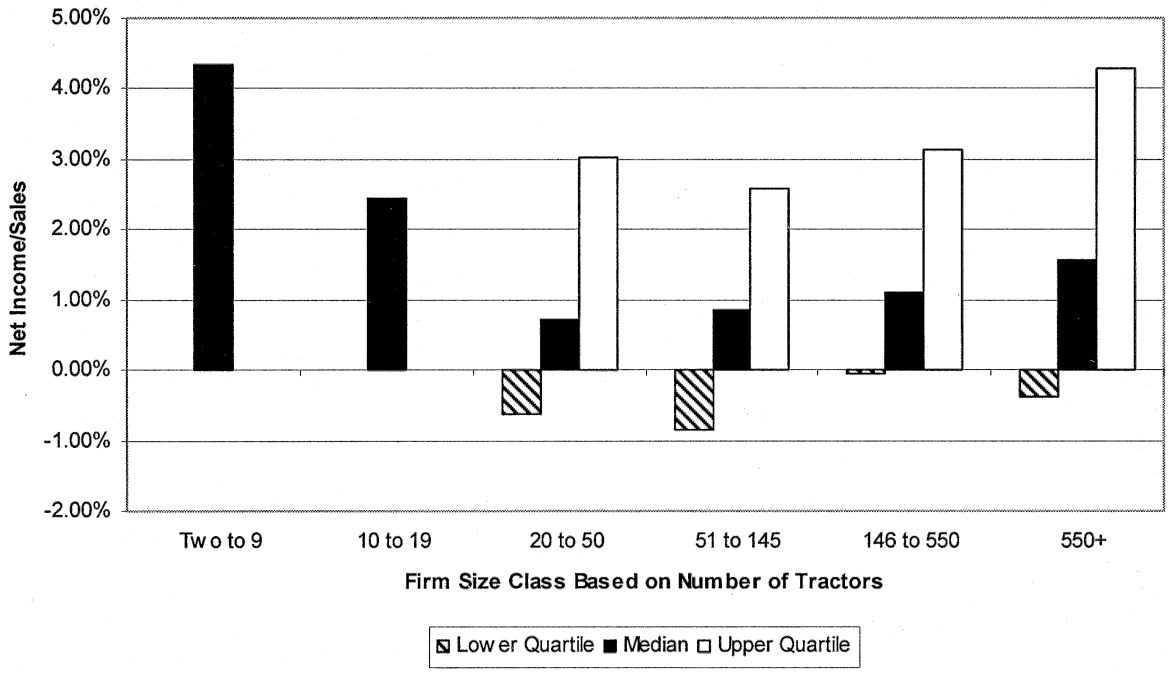
Total Short-Haul Time Savings and Productivity Benefits

Combining the time savings benefit to certain short-haul operations with the productivity benefits obtained from use of the second 16-hour day yields total annual benefits of $280 million. Given that the new, short-haul regulatory regime was included as part of Options 2, 3 and 4, the short-haul operations benefits estimates are the same under all the options.

Total Safety and Non-Safety Benefits

Figure 20 lists total benefits associated with the alternative options.

Figure 20. Baseline Profitability of Representative Carriers



Under Option 2 (today's rule), total annual safety and non-safety benefits equal $300 million (in 2004 dollars). Under Options 3 and 4, total annual safety and non-safety benefits equal $400 million (again, in 2004 dollars).

K.2. Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), FMCSA has evaluated the effects of this proposed rule on small entities, including small businesses, small non-profit organizations, and small governmental entities with populations under 50,000. Most of these small entities operate as motor carriers of property in interstate or intrastate commerce.

This discussion summarizes the small business impact analysis performed for today's rule. The small business impact analysis is broken out by impacts to long-haul (LH) operations versus short-haul (SH) operations, and focuses on the LH sector. This is consistent with the way the results are presented in the RIA summary and lends itself to this type of breakdown for reasons discussed in the RIA. Specifically, the 11th hour of daily driving, the recovery provision, and the split sleeper-berth provision are used almost exclusively by long-haul and regional operations. However, the majority of cost-saving benefits from today's rule accrues to SH operators because the new regulatory regime positively impacts large portions of the SH sector. Additionally, such a break-

out is consistent with how results were presented in the RIA to the 2003 rule.

Focus on Long-Haul Operations

The small business impact analysis considers firm impacts on long-haul truckload carriers in seven size categories, which are shown below with estimates of the number of independent firms falling into each:[6][7]

- 1 tractor (32,800 firms)
- 2–9 tractors (9,800 firms)
- 10–19 tractors (3,500 firms)
- 20–50 tractors (3,500 firms)
- 51–145 tractors (1,800 firms)
- 146–550 tractors (600 firms)
- 550+ tractors (150 firms)

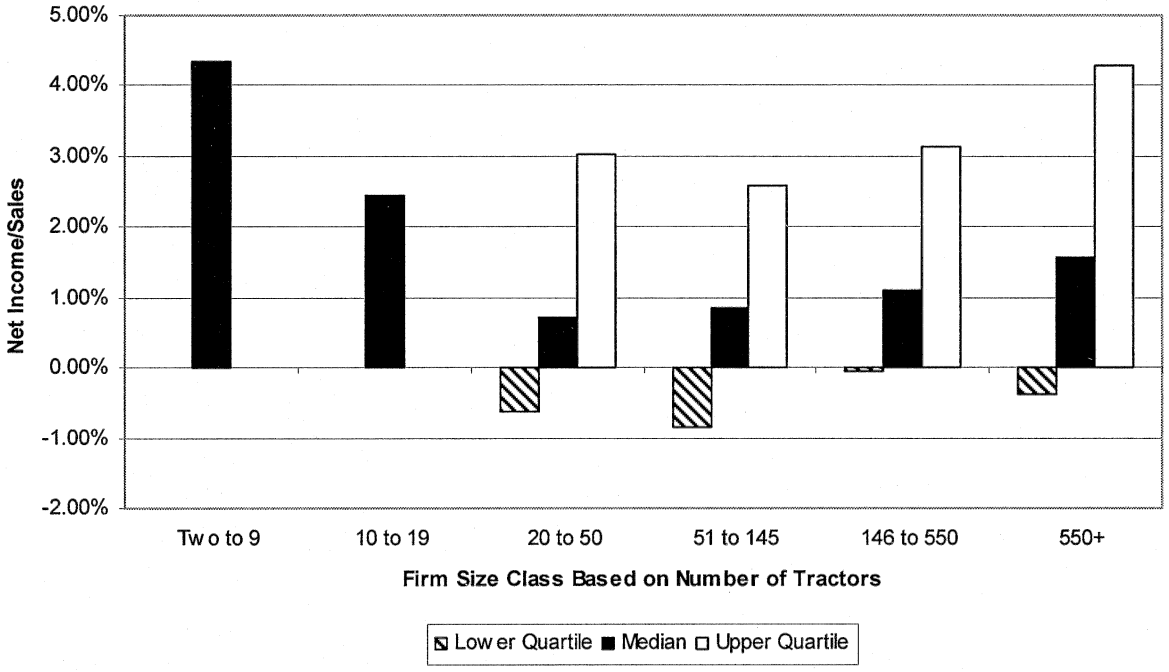
Carriers in the first five of these categories generally qualify as small entities under criteria established by the Small Business Administration (SBA) (i.e., annual revenue of less than $21.5 million) for all North American Industrial Classification System (NAICS) codes falling under the truck transportation sub-sector (NAICS 484). Carriers typically exceed this threshold when they operate more than 145 tractors.[8] The largest two categories encompass those long-haul carriers that do not qualify as small entities under the SBA criteria. The specific size categories enumerated above are intended to reflect natural groupings or breakpoints in terms of firm behaviors and economies of scale.

For representative carriers in each size category, the study estimated the financial impact of each alternative regulatory option in terms of the change in net income (in 2004 dollars) to the carrier,[9] as well as a change in their profits as a fraction of operating revenues. These estimates were developed based on a pro forma financial model of firms of different sizes confronted by changes in productivity, wages, and prices. Figure 21 summarizes the baseline profitability of carriers in the various size categories.

The small business impact analysis conducted here used two industry-specific data sources in developing the firm-level data inputs to the general pro forma model. Annual TTS Blue Book financial data was used as the basis for determining the impact of the change in hours of service regulations on a variety of firm sizes. However, the Blue Book data only includes firms with revenues greater than $3 million per year (approximately 20 tractors). For firm sizes less than this, data from the Risk Management Association (RMA) were used for firms with $0 to $1 million (assumed to represent firms with 2–9 tractors) and $1 to $3 million (assumed to represent firms with 10–19 tractors).

The remainder of this summary is divided into three sections. The first provides an overview of the results of the impact analysis; the second organizes the results by regulatory option; and the third organizes the results by different size categories.

Figure 21. Baseline Profitability of Representative Carriers



[6] Impacts on the private fleets are not expected to be significant. In the case of private fleets, firm impacts generally will be relatively small because trucking comprises only a small portion of firm activities. Furthermore, the options have only slight, and positive, effects on SH costs.

[7] See Chapter 3 and Appendix A of the RIA for the 2003 Rule (contained in the docket) for more details on these estimates.

[8] Based on analysis of data from the TTS Blue Book. This implies total revenue (*i.e.*, from trucking plus other value-added services) averaging approximately $145,000 per tractor across all firm sizes.

[9] Representative carriers for the four largest size categories were selected on the basis of having the median value in the category for profitability (as measured by the ratio of net income to total revenue).

Summary of Results

The impacts to carriers of the three HOS alternative regulatory options are compared relative to a baseline, which consists of the current operating environment (the 2003 rule). As such, all three alternative policy options result in reduced profits on most carriers, given that their provisions are more restrictive than under the 2003 rule. However, the severity of the impacts is directly related to the magnitude of the drop in labor productivities considered for the three options. For instance, the financial impacts under Option 2 (today's rule) are the least adverse, compared with those estimated under the other alternative options (3 and 4). For additional perspective, however, carrier profitability under the options is also shown under the state-of-the-world that existed before the 2003 rules came into effect. This state is referred to as the ''Pre-2003 Situation.'' Comparing the impacts of the new options to this situation may be more realistic in some cases since it is unclear if all carriers have had enough time to adjust to the 2003 HOS rule.

With regard to the specific impacts of each Alternative Option, Option 2 (with a 0.042 percent drop in labor productivity industry-wide, as described in the RIA summary, and a 0.1 percent drop for the for-hire sector, which was analyzed in detail) shows the least severe adverse impacts. As seen in Figure 22, profitability as a share of revenue is projected to decrease by a tenth of one percent or less, relative to Option 1 (2003 rule). These very minor impacts should be reduced slightly as prices adjust.

Option 3 (with a 7.12 percent drop in labor productivity) has the most severe impacts on carriers, and could eliminate net income in the short term for some industry size categories. Results for Option 3 are found in Figure 23. Profitability as a share of revenue is projected to decrease between 1.35 and 2.56 percent across most size classes. The biggest impact of 2.56 percent is felt by the 20–50 size class before prices adjust.

Option 4 (with a 4.61 drop in productivity) shows impacts that are in-between the two extremes. Results for Option 4 are found in Figure 24. Profitability as a share of revenue is projected to decrease between 0.89 and 1.58 percent across most size classes. The results in terms of profit impacts relative to revenues under Option 2 seem to suggest very small impacts for firms across the wide range of size categories examined, including both large and small entities. The threshold for impacts considered to be of moderate size is generally taken to be one percent of revenues, and the average impacts of Option 2 (today's rule) fall far below that magnitude. It should also be noted that even though Option 2 would result in slightly lower profitability than Option 1, carriers would generally earn higher net revenues than they were under the pre-2003 rules, only a short time ago.

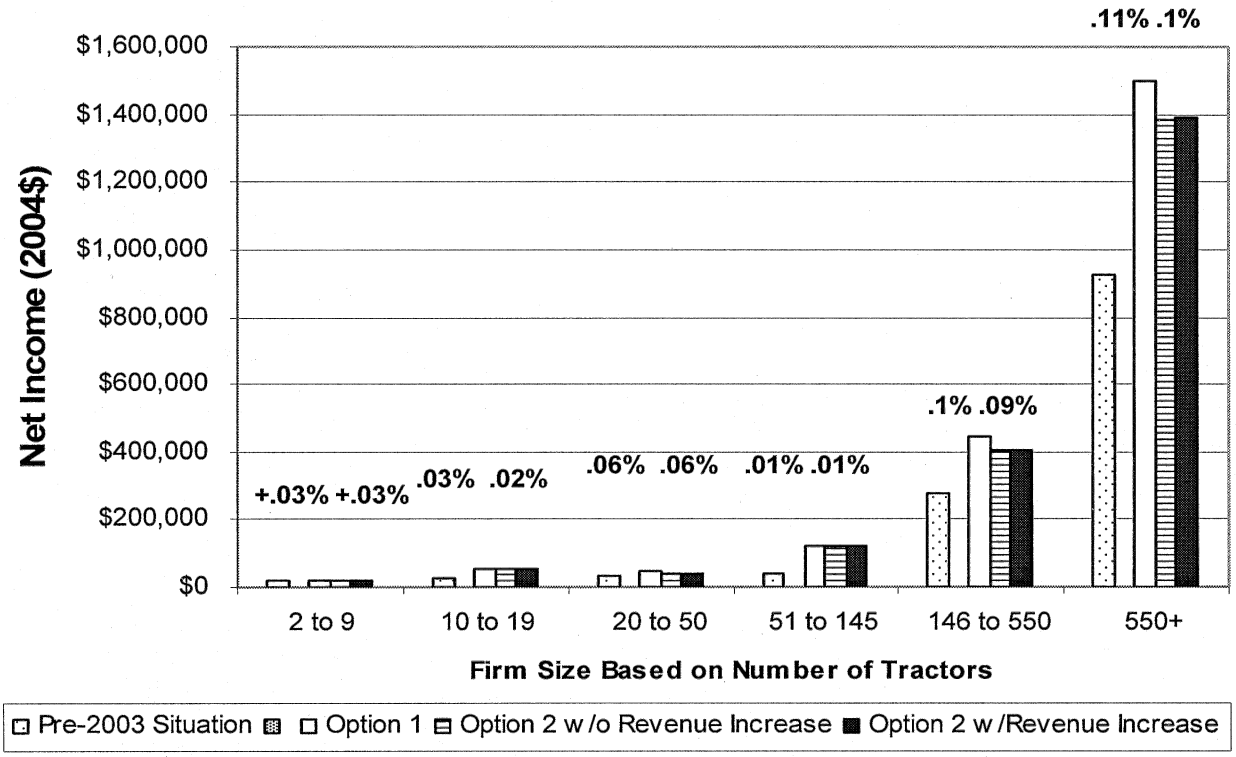
Variability in impacts within each size category, however, means larger impacts for some small entities are possible. The carriers that are currently taking advantage of the split break periods to an above-average degree, for example, will tend to lose more under the options that do not permit its use. Even for these relatively few carriers, however, the average impacts are likely to be well below 1 percent.

Results by Option

Option 2 adversely impacts the net income earned by carriers in almost every size category (with the exception being a very small improvement for the 2–9 category) as shown in Figure 22, although these adverse impacts are very small in magnitude across the entire range of small firms. Figures 23 and 24 show the impacts for different size categories for Options 3 and 4, respectively. Both options result in lower net incomes than for Option 2 (and consequently, lower than in the baseline) in all size categories.

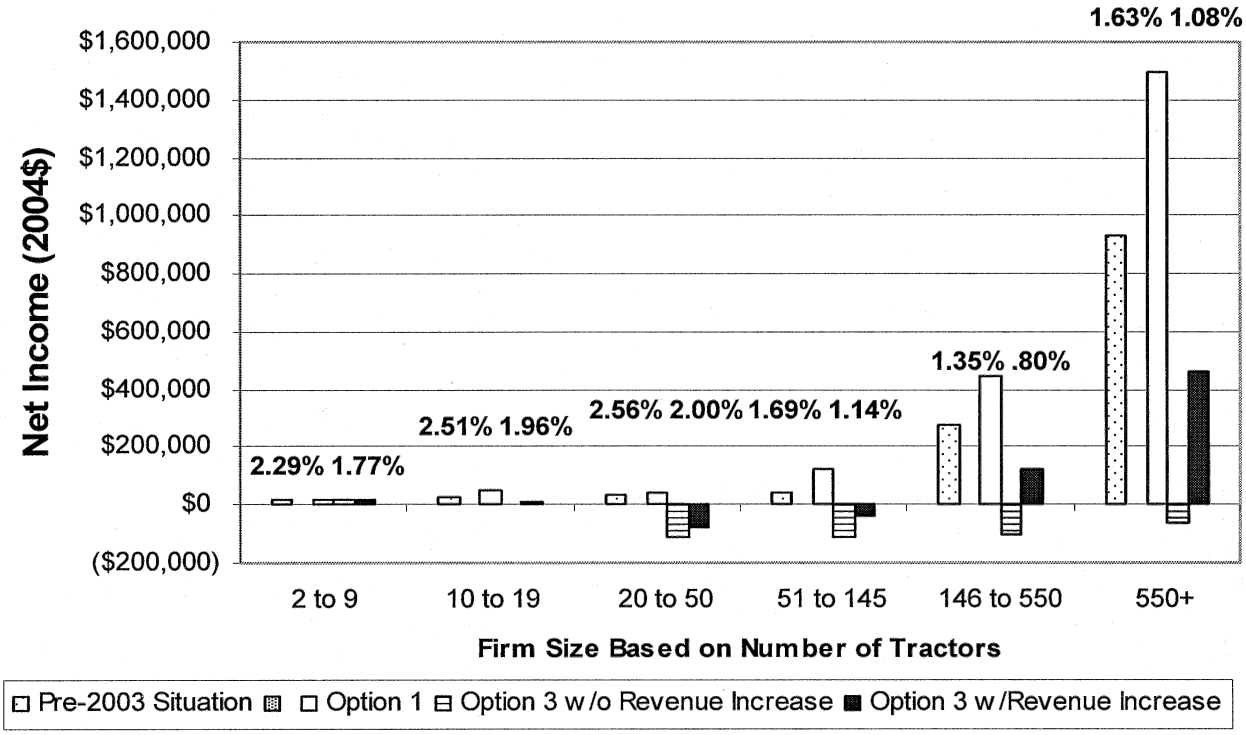
Figures 22 through 24 show the impacts on each size category for two alternatives over the baseline. ''Without Revenue Increase'' implies carriers bear the increased costs due to the rule change without being able to pass the cost increases through to their customers through trucking rate hikes (*i.e.*, zero pass-through). This scenario would be true in the very short run. In the longer run, however, carriers are expected to be able to increase their rates in line with industry-wide increases in costs. This scenario is modeled as ''With Revenue Increase'' which assumes that carriers are able to increase their rates, under the assumption of constant market demand, in order to completely offset the industry-wide average cost increase estimated for the rule options (*i.e.*, complete pass-through). These two extremes of the pass-through assumption were modeled in order to provide a range for the level of impacts associated with the new options and to distinguish between short- and long-term impacts. In addition to showing impacts on net income, the figures indicate the drop in profit as a percentage of operating revenue for each alternative relative to Option 1. Those relative changes are shown above each bar in all three Figures.

Figure 22. Option 2: Change in Median Firm Net Income Relative to Baseline



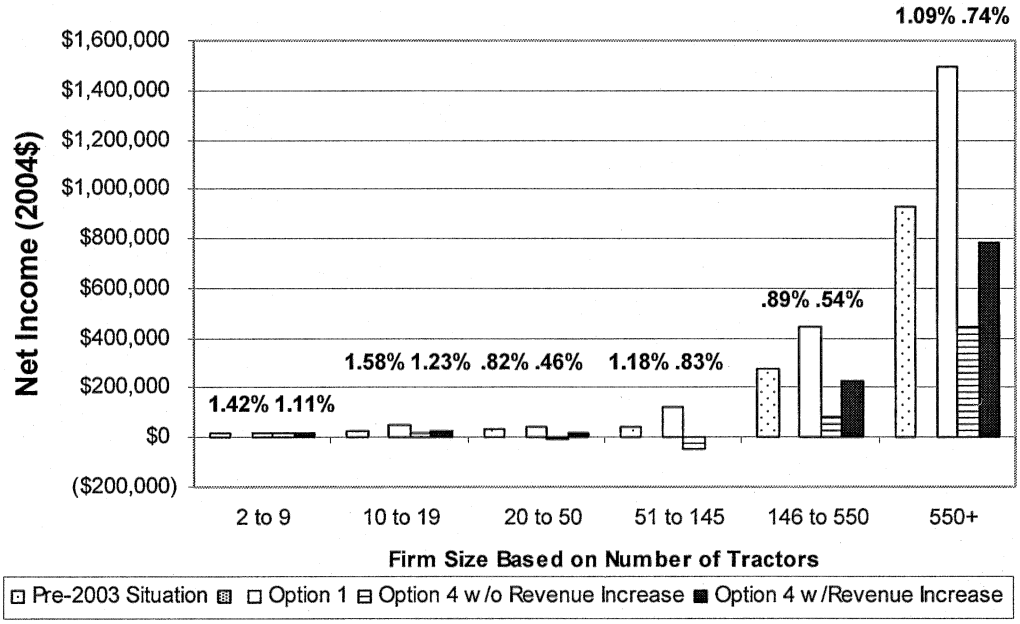
Note 1. Reduction in profit relative to total revenue is indicated over the bars.
Note 2. Profit reduction calculated relative to Option 1 baseline.

Figure 23. Option 3: Change in Median Firm Net Income Relative to Baseline



Note 1. Reduction in profit relative to total revenue is indicated over the bars.
Note 2. Profit reduction calculated relative to Option 1 baseline.

Figure 24. Option 4: Change in Median Firm Net Income Relative to Baseline



Note 1. Reduction in profit relative to total revenue is indicated over the bars.
Note 2. Profit reduction calculated relative to Option 1 baseline.

Differential Impacts on Small Carriers: Results by Size Categories

This section describes impacts on carriers for the smaller size categories. The discussion is divided into four parts: one for owner operators; one for firms with 2–9 tractors; one for firms with 10–19 tractors and the last for the larger size categories. As expected, the percentage changes in net income indicate that the impacts are less in the longer run when carriers can increase their revenue by passing the industry-wide cost increases on to their customers.

Impacts on the profitability of certain firm sizes appear to be greater than the impacts on others. This pattern is closely tied to the differences in baseline profitability levels: those size categories with lower rates of profit in the baseline are naturally somewhat more vulnerable to a similar change in productivity.

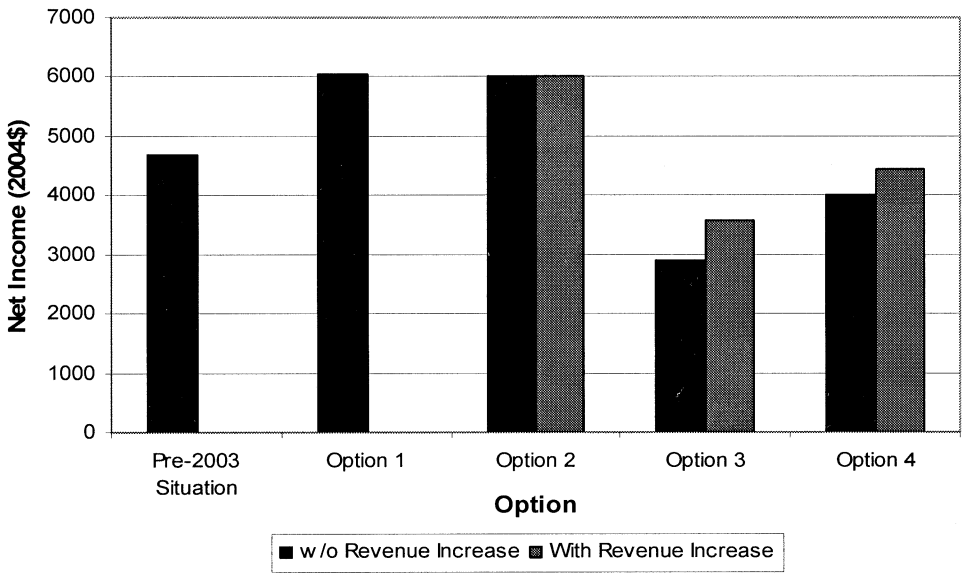
Owner Operators with One Tractor

The smallest size category, one tractor, is examined in order to evaluate impacts on individual owner/operators. Figure 25 shows the change in net income for these owner/operators under each option. These impacts are presented relative to Option 1. The pre-2003 situation is shown as well.

Owner/operators with one tractor would earn virtually the same under Option 2 as Option 1, and less under the other two options. Net income is actually higher under Option 2 than in the pre-2003 situation. Owner-operators that had not had sufficient time to adjust to the 2003 rule may therefore experience an improvement in their situations.

Note that the ''net income'' measured by this study for owner/operators is slightly different in meaning than that for firms in other size categories due to treatment of wages. For owner/operators, net income is the same as take-home pay (analogous to wages). The owner/operator ''takes home'' any residual after paying all other expenses. In contrast, the net income of larger firms subtracts out wages along with other expenses. Due to this difference, the net income calculated for owner/operators is not directly comparable to that calculated for other firm sizes, and it tends to be higher when stated as a percent of revenue.

Figure 25. Change in Net Income for Owner Operators (One Tractor/Trailer)



Note. Net income for owner operators includes wages. See text for details.

Firms With 2–9 Tractors

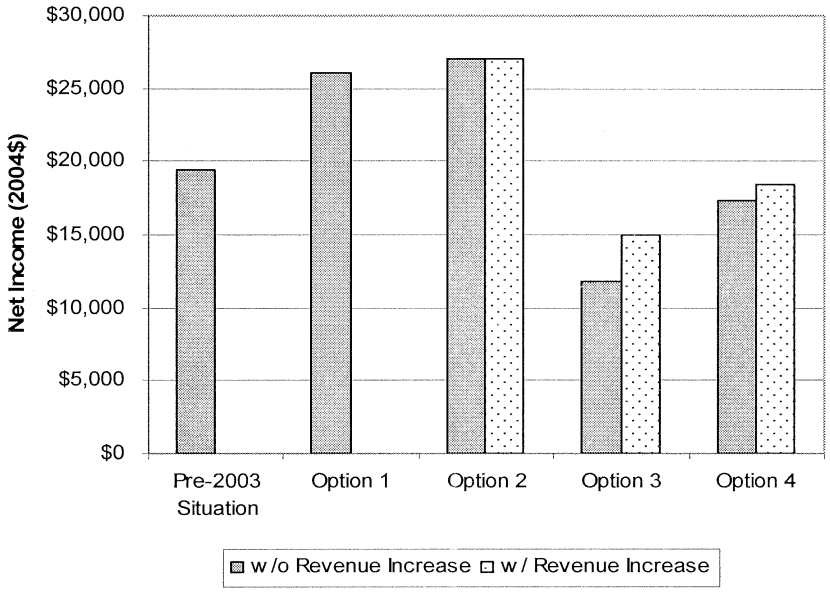
Firms operating between 2 and 9 tractors, like others toward the smaller end of the size distribution, may have less flexibility to respond to a change in the hours of service rules. Whereas larger firms can hire or lay off drivers in order to optimize their operations relative to any of the options, firms with 2–9 tractors are too small to do this in optimal fashion, at least in the near term.[10] As discussed above, firms must hire additional drivers in order to maintain their current business under all three options. Firms in the 2–9 tractor category, however, do not have enough current business to justify hiring another full-time driver. They would, optimally, hire a fraction of a driver in response to the new options. Assuming this is not possible, these firms must instead sacrifice some of their business, at least in the near term.[11]

As shown in Figure 26, carriers in this size category are expected to gain to an insignificant degree under Option 2, most likely due to slight changes in driver wages. They would be adversely impacted under Options 3 and 4 relative to Option 1, because of their inability to meet existing orders and the loss of the corresponding revenues. Near-term impacts (''without revenue increase''—*i.e.*, before prices for trucking services adjust to the cost increases) are higher than the long-run impacts (''with revenue increase'').

[10] To a lesser extent this also is true for firms in the 10–19 tractor size category. Firms with 10–19 tractors have enough flexibility, however, that their impacts are similar to (but smaller than) those of firms in larger size categories.

[11] In the longer term, firms should be able to adjust their operations to a greater extent in order to fill capacity, so the impacts on these firms should tend to diminish over time.

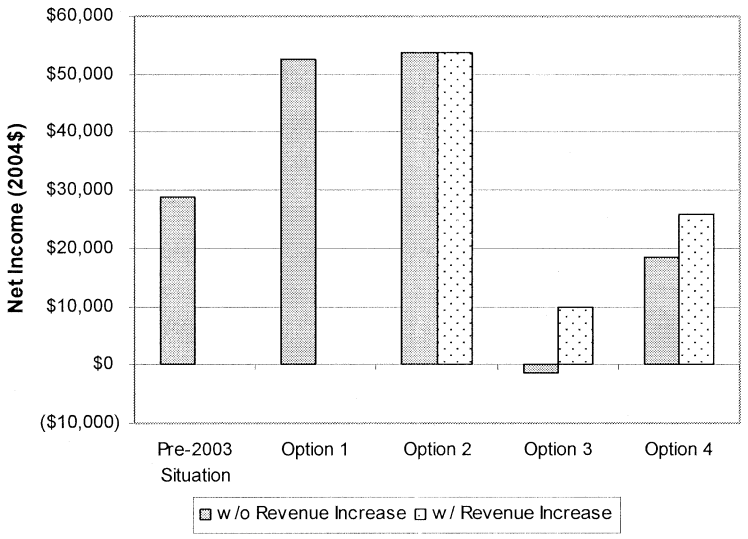
Figure 26. Net Income Per Firm: 2-9 Tractors



Firms With 10–19 Tractors

Impacts for the 10–19 tractor size category differ somewhat from the 2–9 size category. Again, as shown in Figure 27, there is almost no impact under Option 2. Due to their lower baseline profitability, the percentage drop in net income for this size category under Options 3 and 4 appears to be greater than the 2–9 size category.

Figure 27. Net Income Per Firm: 10-19 Tractors



Other Size Categories (20–50 Tractors, 51–145 Tractors, 146–550 Tractors, 550+ Tractors)

Figures 28 through 31 summarize the expected change in profitability for firms in the remaining four size categories. These impacts appear less severe if carriers are assumed to have an opportunity to increase their rates to offset the higher costs of the new rules. Moreover, though the carriers are generally less well off under Option 2 than under Option 1 (except carriers in the 51–145 size category, where they are virtually the same), many are likely to be better off than they were under the pre-2003 rules.

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Figure 28. Net Income Per Firm: 20-50 Tractors

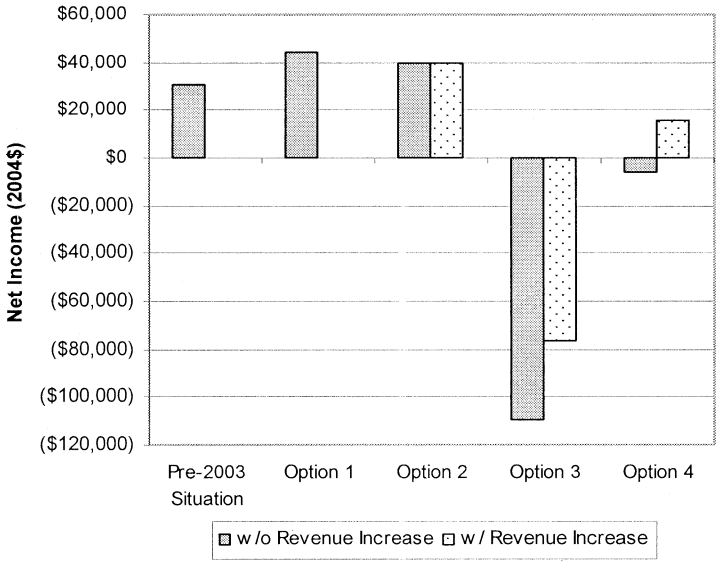


Figure 29. Net Income Per Firm: 51-145 Tractors

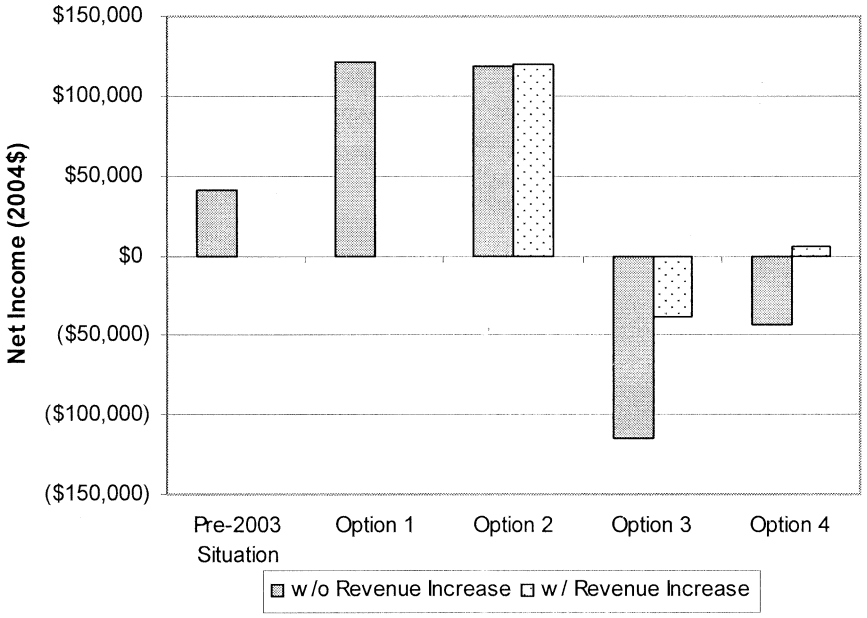


Figure 30. Net Income Per Firm: 146-550 Tractors

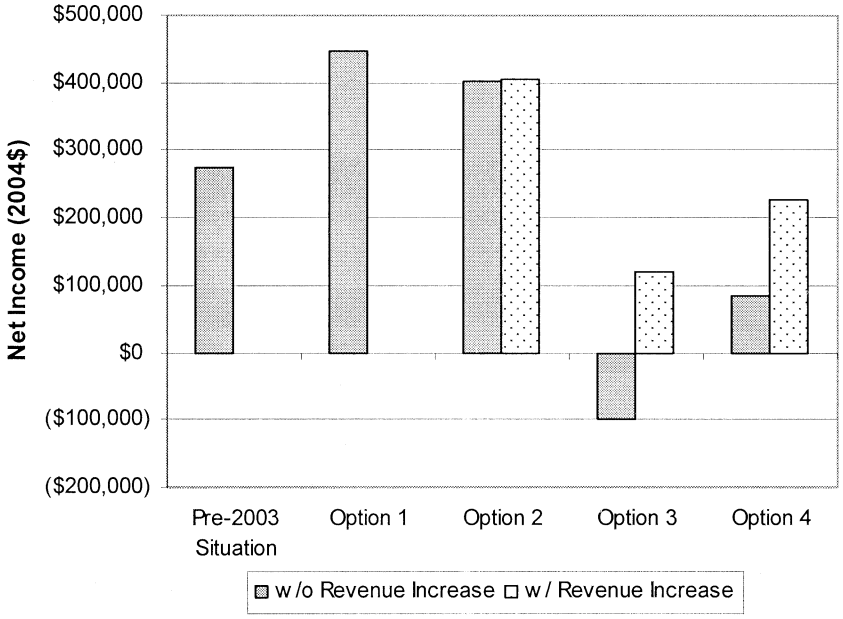
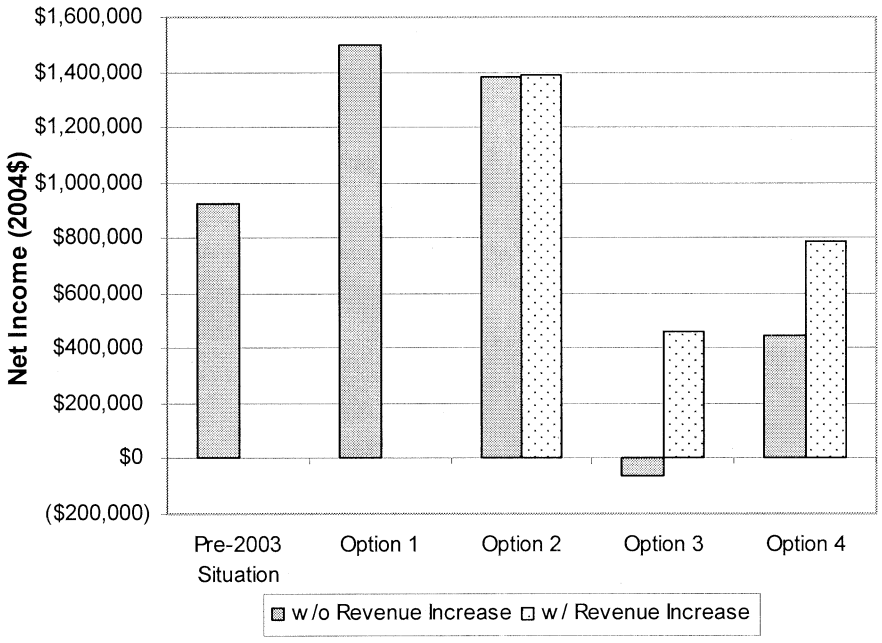


Figure 31. Net Income Per Firm: 550+ Tractors



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Conclusions

As discussed earlier in this section, Option 2 (today's rule) will have minimal effects on the net income levels of typical entities in each of the size categories of small entities examined. Specifically, for small firms in each size group (i.e., 2–9 tractors, 10–19 tractors, etc.), adverse financial impacts are estimated to be 0.1 percent or less compared to Option 1 (the 2003 rule). And when compared to the pre-2003 rule, many of these carriers will earn higher net revenues. Therefore, the FMCSA Administrator, in compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), has considered the economic impacts of these requirements on small entities and certifies that this final rule does not have a significant economic impact on a substantial number of small entities.

K.3. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 requires each agency to assess the effects of its regulatory actions on

State, local, and tribal governments and the private sector. Any agency promulgating a final rule resulting in a Federal mandate requiring expenditure by a State, local or tribal government or by the private sector of $120.7 million [12] or more in any one year must prepare a written statement incorporating various assessments, estimates, and descriptions that are delineated in the Act. In light of the fact that today's rule would not cost State, local, or tribal governments, or motor carriers, more than $120.7 million in a given year, FMCSA is not required to prepare a statement addressing each of the elements outlined in the Unfunded Mandates Reform Act of 1995.

K.4. National Environmental Policy Act

FMCSA has prepared an environmental assessment (EA) in accordance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321, *et seq.*, as amended), the FMCSA's NEPA Implementing Procedures and Policy for Considering Environmental Impacts (FMCSA Order 5610.1),[13] the Council on Environmental Quality Regulations (CEQ) regulations implementing NEPA (40 CFR parts 1500–1508), the DOT Order 5610.C (September 18, 1979, as amended on July 13, 1982 and July 30, 1985), entitled ''Procedures for Considering Environmental Impacts,'' and other pertinent environmental regulations, Executive Orders, statutes, and laws for consideration of environmental impacts of FMCSA actions. The Agency relies on all of the authorities noted above to ensure that it actively incorporates environmental considerations into informed decision-making on all of its actions, including rulemaking.

In its EA, FMCSA evaluated three alternatives to a baseline (No Action Alternative) and estimated the impacts relative to that baseline. The options include:

- No Action Alternative (Option 1): Continue to Implement 2003 HOS Rule.
- Alternative 1 (Option 2): Proposed Action or Today's rule, as described in this preamble.
- Alternative 2 (Option 3): No more than 10 hours of driving within each 14-hour on duty period, elimination of the split sleeper berth option, and a requirement of 58 consecutive hours off duty before restarting one's 60/70 hour clock within each seven or eight-day duty period.
- Alternative 3 (Option 4): Same as Option 3, but with a requirement of 44 consecutive hours off duty before restarting one's 60/70 hour on duty clock within each seven or eight-day duty period.

Each option is discussed in more detail in the EA that accompanies today's rule.

As background for the ''No Action Alternative,'' if FMCSA did not adopt a new rule before September 30, 2005, when the provisions enacted by Sec. 7(f) of the Surface Transportation Extension Act of 2004, Part V, expire, the 2003 HOS rule would still remain in effect at the State level for a considerable period of time (see Environmental Assessment, Section 2.1) due to the Motor Carrier Safety Assistance Program (MCSAP). Under MCSAP, States that accept funds (i.e., all of the States) have three years to adopt regulations ''compatible'' with the Federal Motor Carrier Safety Regulations. ''Compatible'' means ''identical'' for State regulations that apply to interstate motor carriers. About 60% of the States would retain State rules identical to FMCSA's 2003 HOS rule; they would not be required to change those rules for three full years after the new Federal regulatory situation took effect. Since these States are scattered randomly throughout the country, State HOS rules identical to FMCSA's 2003 HOS rule would probably remain applicable to most long-haul truckers most of the time for a considerable period, perhaps for years. FMCSA has therefore concluded that the ''no-action'' alternative really amounts to retention of the 2003 HOS rule.

FMCSA regulations for implementing NEPA and CEQ NEPA regulations require a comparison of the potential impacts of each Alternative. Figure 32 summarizes the impacts for each Alternative across each of the impact areas. Most impacts are evaluated in terms of the percent change from the status quo (No Action Alternative). ''Minor'' is defined here as a 0 to 1 percent change from the status quo (0 ±1 percent), while ''Moderate'' is defined as a ±10 percent or greater change. Note that these impacts are measured as a change from the No Action Alternative. As shown in Figure 32, none of the Alternatives would have a significant adverse impact on the human environment, and all of the Alternatives would have beneficial impacts in some impact areas. None of the Alternatives stands out as environmentally preferable, when compared to the other Alternatives. For details of the findings of this analysis, please see the EA performed for this rulemaking located in the docket.

FIGURE 32.—COMPARISON OF ALTERNATIVES

Impact area	No action	Alt 1	Alt 2	Alt 3
Air Pollutant—NAAQS	No Change	Minor Benefit	Minor Benefit (0.16% decrease).	Minor Benefit (0.12% decrease).
Air Pollutant—Air Toxics	No Change	Minor impact	Minor impact (0.16% increase).	Minor impact (0.10% increase).
Air Pollutant—Climate Change	No Change	Minor decrease in CO_2.	Minor decrease in CO_2.	Minor decrease in CO_2.
Public Health	No Change	Minor Benefit	Minor Benefit	Minor Benefit.
Noise	No Change	No Impact	No Impact	No Impact.
HM Transportation	No Change	Minor Benefit	Minor Benefit	Minor Benefit.
Solid Waste Disposal	No Change	Minor Benefit	Minor Benefit	Minor Benefit.
Safety	No Change	Minor Benefit	Minor Benefit	Minor Benefit.
Transportation Energy Consumption	No Change	No benefit	Minor Benefit (0.27% decrease).	Minor Benefit (0.18% decrease).
Land Consumption	No Change	Minor Induced Impact Impact (5.3 acres).	Minor Induced (1,574 acres).	Minor Induced Impact (1,019 acres).
Section 4(f)	No Change	No Impact	No Impact	No Impact.

[12] USDOT policy requires an unfunded mandates analysis for rules requiring an expenditure of $120.7 million or more, which is $100 million in 1995 dollars inflated to 2003 dollars.

[13] FMCSA's environmental procedures were published on March 1, 2004 (69 FR 9680), FMCSA Order 5610.1, National Environmental Policy Act Implementing Procedures and Policy for Considering Environmental Impacts, and effective on March 30, 2004.

FIGURE 32.—COMPARISON OF ALTERNATIVES—Continued

Impact area	No action	Alt 1	Alt 2	Alt 3
Endangered Species	No Change	No Impact	No Impact	No Impact.
Wetlands	No Change	No Impact	No Impact	No Impact.
Historic Properties	No Change	No Impact	No Impact	No Impact.

As shown in the Environmental Assessment that accompanies today's rule, none of the alternatives considered would have a significant adverse impact on the human environment. Subsequently, FMCSA has determined that today's rule will not significantly affect the quality of the human environment and that a comprehensive Environmental Impact Statement is not required. The EA for today's rule, as well as the Agency's finding of no significant impact (FONSI), are contained in the docket.

K.5. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulations. FMCSA has determined that this final rule will affect a currently approved information clearance for OMB Control Number 2126–0001, titled ''Hours of Service of Drivers Regulation.'' OMB approved this information collection on April 29, 2003, at a revised total of 160,376,492 burden hours, with an expiration date of April 30, 2006. The PRA requires agencies to provide a specific, objectively supported estimate of burden that will be imposed by the information collection. See 5 CFR 1320.8.

The paperwork burden imposed by FMCSA's record-of-duty-status (RODS) requirement is set forth at 49 CFR 395.8.

The Agency estimates that the revisions to Part 395 in this final rule will eliminate the RODS paperwork burden for at least 239,400 commercial drivers previously required to complete and maintain the RODS, or what is commonly referred to as a ''logbook.''

Specifically, today's final rule eliminates the split sleeper-berth provision, which the Agency estimated would result in the hiring of 600 additional drivers by the long-haul and regional sector of the industry in order to provide the same level of transportation service as that generated prior to today's final rule. All of these new drivers would be required to file RODS, as they all would operate in the regional and long-haul sector. However, this increase is more than offset by the new short-haul regulatory regime implemented in today's rule, which provides significant paperwork relief to portions of the short-haul industry. The RIA prepared for today's final rule estimated that at least 240,000 commercial drivers operating in the short-haul sector would be relieved of the logbook filing required. As such, the Agency estimates that at least 239,400 commercial drivers, or roughly six percent of the drivers previously required to file RODS, would be relieved of the logbook filing requirement as a result of today's rule. As a result of these changes, the total RODS burden will be reduced by approximately 7 million hours annually.

A supporting statement reflecting this assessment has been submitted to OMB. You may submit comments on this information collection burden (OMB Control Number 2126–0001) directly to OMB. OMB must receive your comments by October 24, 2005. You must mail or hand deliver your comments to: Attention: Desk Officer for the Department of Transportation, Docket Library, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, 725 17th Street, NW., Washington, DC 20503.

K.6. Executive Order 13211 (Energy Supply, Distribution, or Use)

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. As a part of the environmental assessment, the FMCSA analyzed the three alternatives discussed earlier in today's final rule. The FMCSA found none of these effects to be significant.

In accordance with Executive Order 13211, the Agency prepared a Statement of Energy Effects for this final rule. A copy of this statement is in the Appendix to the environmental assessment.

K.7. Executive Order 12898 (Environmental Justice)

The FMCSA evaluated the environmental effects of the Proposed Action and alternatives in accordance with Executive Order 12898 and determined that there were no environmental justice issues associated with revising the hours of service regulations. Environmental justice issues would be raised if there were ''disproportionate'' and ''high and adverse impact'' on minority or low income populations. The FMCSA determined through the analyses documented in the Environmental Assessment in the docket prepared for this final rule that there were no high and adverse impacts associated with any of the alternatives. In addition, FMCSA analyzed the demographic makeup of the trucking industry potentially affected by the alternatives and determined that there was no disproportionate impact on minority or low-income populations. Low-income and minority populations historically have been and generally continue to be underrepresented in the trucking occupation. Given this level of low-income and minority representation and particularly in view of the previously referenced conclusion that there were no disproportionate and high or adverse impacts on any population sector associated with any of the alternatives considered in this rule, we ratify our preliminary conclusion in the NPRM that there are no environmental justice issues associated with revising the hours-of-service regulations. The Environmental Assessment provides a detailed analysis that was used to reach this conclusion.

K.8. Executive Order 13045 (Protection of Children)

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (April 23, 1997, 62 FR 19885), requires that agencies issuing ''economically significant'' rules that also concern an environmental health or safety risk that an Agency has reason to state may disproportionately affect children, must include an evaluation of the environmental health and safety effects of the regulation on children. Section 5 of Executive Order 13045 directs an Agency to submit for a ''covered regulatory action'' an evaluation of its environmental health or safety effects on children.

The FMCSA evaluated the projected effects of this final rule and determined that there would be no environmental health risks or safety risks to children. This rule does not substantially impact

the total amount of freight being transported nationally and thus does not significantly impact overall air quality due to fuel emissions. This rule will, however, reduce the safety risk posed by tired, drowsy, or fatigued drivers of CMVs. These safety risk improvements would accrue to children and adults equally.

K.9. Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

K.10. Executive Order 12630 (Taking of Private Property)

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

K.11. Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. The FMCSA has determined this rule does not have a substantial direct effect on States, nor would it limit the policymaking discretion of the States. Nothing in this document preempts any State law or regulation. A State that fails to adopt the new amendments in this final rule within three years of the effective date of this rule, will be deemed to have incompatible regulations and will not be eligible for Basic Program nor Incentive Funds in accordance with 49 CFR 350.335(b).

K.12. Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number or 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

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List of Subjects

49 CFR Part 385

Administrative practice and procedure, Highway safety, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 390

Highway safety, Intermodal transportation, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 395

Highway safety, Motor carriers, Reporting and recordkeeping requirements.

n In consideration of the foregoing, FMCSA amends 49 CFR, chapter III, parts 385, 390, and 395 as set forth below:

PART 385—SAFETY FITNESS PROCEDURES

n 1. The authority citation for part 385 continues to read as follows:

Authority: 49 U.S.C. 113, 504, 521(b), 5105(e), 5109, 5113, 13901–13905, 31136, 31144, 31148, and 31502; Sec. 350 of Pub. L. 107–87; and 49 CFR 1.73.

n 2. Amend appendix B to part 385 as follows:

n a. Revise section II.(c) as follows;

n b. Amend section VII as follows:

(i) Revise the citations and text for §§ 395.1(h)(1)(i) through (h)(1)(iv) and 395.3(a)(1) through 395.3(b)(2) as follows; and

(ii) Revise the citations and text for §§ 395.1(h)(2)(i) through (h)(2)(iv), 395.1(o), and 395.3(c)(1) through 395.5(b)(2) as follows:

Appendix B to Part 385 Explanation of Safety Rating Process

* * * * *

II. Converting CR Information Into a Safety Rating

* * * * *

(c) Critical regulations are those identified as such where noncompliance relates to management and/or operational controls. These are indicative of breakdowns in a carrier's management controls. An example of a critical regulation is § 395.3(a)(1), requiring or permitting a property-carrying commercial motor vehicle driver to drive more than 11 hours.

* * * * *

VII. List of Acute and Critical Regulations.

* * * * *

§ 395.1(h)(1)(i) Requiring or permitting a property-carrying commercial motor vehicle driver to drive more than 15 hours (Driving in Alaska) (critical).

§ 395.1(h)(1)(ii) Requiring or permitting a property-carrying commercial motor vehicle driver to drive after having been on duty 20 hours (Driving in Alaska) (critical).

§ 395.1(h)(1)(iii) Requiring or permitting a property-carrying commercial motor vehicle driver to drive after having been on duty more than 70 hours in 7 consecutive days (Driving in Alaska) (critical).

§ 395.1(h)(1)(iv) Requiring or permitting a property-carrying commercial motor vehicle driver to drive after having been on duty more than 80 hours in 8 consecutive days (Driving in Alaska) (critical).

§ 395.1(h)(2)(i) Requiring or permitting a passenger-carrying commercial motor vehicle driver to drive more than 15 hours (Driving in Alaska) (critical).

§ 395.1(h)(2)(ii) Requiring or permitting a passenger-carrying commercial motor vehicle driver to drive after having been on duty 20 hours (Driving in Alaska) (critical).

§ 395.1(h)(2)(iii) Requiring or permitting a passenger-carrying commercial motor vehicle driver to drive after having been on duty more than 70 hours in 7 consecutive days (Driving in Alaska) (critical).

§ 395.1(h)(2)(iv) Requiring or permitting a passenger-carrying commercial motor vehicle driver to drive after having been on duty more than 80 hours in 8 consecutive days (Driving in Alaska) (critical).

§ 395.1(o) Requiring or permitting a property-carrying commercial motor vehicle driver to drive after having been on duty 16 consecutive hours (critical).

§ 395.3(a)(1) Requiring or permitting a property-carrying commercial motor vehicle driver to drive more than 11 hours (critical).

§ 395.3(a)(2) Requiring or permitting a property-carrying commercial motor vehicle driver to drive after the end of the 14th hour after coming on duty (critical).

§ 395.3(b)(1) Requiring or permitting a property-carrying commercial motor vehicle driver to drive after having been on duty more than 60 hours in 7 consecutive days (critical).

§ 395.3(b)(2) Requiring or permitting a property-carrying commercial motor vehicle driver to drive after having been on duty more than 70 hours in 8 consecutive days (critical).

§ 395.3(c)(1) Requiring or permitting a property-carrying commercial motor vehicle driver to restart a period of 7 consecutive days without taking an off-duty period of 34 or more consecutive hours (critical).

§ 395.3(c)(2) Requiring or permitting a property-carrying commercial motor vehicle driver to restart a period of 8 consecutive days without taking an off-duty period of 34 or more consecutive hours (critical).

§ 395.5(a)(1) Requiring or permitting a passenger-carrying commercial motor vehicle driver to drive more than 10 hours (critical).

§ 395.5(a)(2) Requiring or permitting a passenger-carrying commercial motor vehicle driver to drive after having been on duty 15 hours (critical).

§ 395.5(b)(1) Requiring or permitting a passenger-carrying commercial motor vehicle driver to drive after having been on duty more than 60 hours in 7 consecutive days (critical).

§ 395.5(b)(2) Requiring or permitting a passenger-carrying commercial motor vehicle driver to drive after having been on duty more than 70 hours in 8 consecutive days (critical).

* * * * *

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

n 3. The authority citation for part 390 is revised to read as follows:

Authority: 49 U.S.C. 508, 13301, 13902, 31133, 31136, 31502, 31504, and sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 217, Pub. L. 106–159, 113 Stat. 1748, 1767; and 49 CFR 1.73.

n 4. Revise paragraphs (b) and (c) of § 390.23 to read as follows:

§ 390.23 Relief from regulations.

* * * * *

(b) Upon termination of direct assistance to the regional or local emergency relief effort, the motor carrier or driver is subject to the requirements of parts 390 through 399 of this chapter, with the following exception: A driver may return empty to the motor carrier's terminal or the driver's normal work reporting location without complying with parts 390 through 399 of this chapter. However, a driver who informs the motor carrier that he or she needs immediate rest must be permitted at least 10 consecutive hours off duty before the driver is required to return to such terminal or location. Having returned to the terminal or other location, the driver must be relieved of all duty and responsibilities. Direct assistance terminates when a driver or commercial motor vehicle is used in interstate commerce to transport cargo not destined for the emergency relief effort, or when the motor carrier dispatches such driver or commercial motor vehicle to another location to begin operations in commerce.

(c) When the driver has been relieved of all duty and responsibilities upon termination of direct assistance to a regional or local emergency relief effort, no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive in commerce until:

(1) The driver has met the requirements of §§ 395.3(a) and 395.5(a) of this chapter; and

(2) The driver has had at least 34 consecutive hours off-duty when:

(i) The driver has been on duty for more than 60 hours in any 7 consecutive days at the time the driver is relieved of all duty if the employing motor carrier does not operate every day in the week, or

(ii) The driver has been on duty for more than 70 hours in any 8 consecutive days at the time the driver is relieved of all duty if the employing motor carrier operates every day in the week.

PART 395—HOURS OF SERVICE OF DRIVERS

n 5. The authority citation for part 395 continues to read as follows:

Authority: 49 U.S.C. 504, 14122, 31133, 31136, and 31502; sec. 113, Pub. L. 103–311, 108 Stat. 1673, 1676; and 49 CFR 1.73.

n 6. Add § 395.0 to read as follows:

§ 395.0 Rescission.

Any regulations on hours of service of drivers in effect before April 28, 2003, which were amended or replaced by the final rule adopted on April 28, 2003 [69 FR 22456] are rescinded and not in effect.

n 7. Section 395.1 is amended by revising paragraphs (a)(1), (b)(1), (e), (g), (h), (j), (k), and (o) to read as follows:

§ 395.1 Scope of rules in this part.

* * * * *

(a) *General.* (1) The rules in this part apply to all motor carriers and drivers, except as provided in paragraphs (b) through (o) of this section.

* * * * *

(b) *Adverse driving conditions.* (1) Except as provided in paragraph (h)(2) of this section, a driver who encounters adverse driving conditions, as defined in § 395.2, and cannot, because of those conditions, safely complete the run within the maximum driving time permitted by §§ 395.3(a) or 395.5(a) may drive and be permitted or required to drive a commercial motor vehicle for not more than 2 additional hours in order to complete that run or to reach a place offering safety for the occupants of the commercial motor vehicle and security for the commercial motor vehicle and its cargo. However, that driver may not drive or be permitted to drive—

(i) For more than 13 hours in the aggregate following 10 consecutive hours off duty for drivers of property-carrying commercial motor vehicles;

(ii) After the end of the 14th hour since coming on duty following 10 consecutive hours off duty for drivers of property-carrying commercial motor vehicles;

(iii) For more than 12 hours in the aggregate following 8 consecutive hours off duty for drivers of passenger-carrying commercial motor vehicles; or

(iv) After he/she has been on duty 15 hours following 8 consecutive hours off duty for drivers of passenger-carrying commercial motor vehicles.

* * * * *

(e) *Short-haul operations*—(1) *100 air-mile radius driver.* A driver is exempt from the requirements of § 395.8 if:

(i) The driver operates within a 100 air-mile radius of the normal work reporting location;

(ii) The driver, except a driver-salesperson, returns to the work reporting location and is released from work within 12 consecutive hours;

(iii)(A) A property-carrying commercial motor vehicle driver has at least 10 consecutive hours off duty separating each 12 hours on duty;

(B) A passenger-carrying commercial motor vehicle driver has at least 8 consecutive hours off duty separating each 12 hours on duty;

(iv)(A) A property-carrying commercial motor vehicle driver does not exceed 11 hours maximum driving time following 10 consecutive hours off duty; or

(B) A passenger-carrying commercial motor vehicle driver does not exceed 10 hours maximum driving time following 8 consecutive hours off duty; and

(v) The motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records showing:

(A) The time the driver reports for duty each day;

(B) The total number of hours the driver is on duty each day;

(C) The time the driver is released from duty each day; and

(D) The total time for the preceding 7 days in accordance with § 395.8(j)(2) for drivers used for the first time or intermittently.

(2) *Operators of property-carrying commercial motor vehicles not requiring a commercial driver's license.* Except as provided in this paragraph, a driver is exempt from the requirements of § 395.3 and § 395.8 and ineligible to use the provisions of § 395.1(e)(1), (g) and (o) if:

(i) The driver operates a property-carrying commercial motor vehicle for which a commercial driver's license is not required under part 383 of this subchapter;

(ii) The driver operates within a 150 air-mile radius of the location where the driver reports to and is released from work, *i.e.*, the normal work reporting location;

(iii) The driver returns to the normal work reporting location at the end of each duty tour;

(iv) The driver has at least 10 consecutive hours off duty separating each on-duty period;

(v) The driver does not drive more than 11 hours following at least 10 consecutive hours off duty;

(vi) The driver does not drive:

(A) After the 14th hour after coming on duty on 5 days of any period of 7 consecutive days; and

(B) After the 16th hour after coming on duty on 2 days of any period of 7 consecutive days;

(vii) The driver does not drive:

(A) After having been on duty for 60 hours in 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week;

(B) After having been on duty for 70 hours in 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week;

(viii) Any period of 7 or 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours.

(ix) The motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records showing:

(A) The time the driver reports for duty each day;

(B) The total number of hours the driver is on duty each day;

(C) The time the driver is released from duty each day;

(D) The total time for the preceding 7 days in accordance with § 395.8(j)(2) for drivers used for the first time or intermittently.

* * * * *

(g) *Sleeper berths*—(1) *Property-carrying commercial motor vehicle*—(i) *In General.* A driver who operates a property-carrying commercial motor vehicle equipped with a sleeper berth, as defined in §§ 395.2 and 393.76 of this subchapter, (A) Must, before driving, accumulate

(*1*) At least 10 consecutive hours off duty;

(*2*) At least 10 consecutive hours of sleeper-berth time;

(*3*) A combination of consecutive sleeper-berth and off-duty time amounting to at least 10 hours; or

(*4*) The equivalent of at least 10 consecutive hours off duty if the driver does not comply with paragraph (g)(1)(i)(A)(*1*), (*2*), or (*3*) of this section;

(B) May not drive more than 11 hours following one of the 10-hour off-duty periods specified in paragraph (g)(1)(i)(A)(*1*) through (*4*) of this section; and

(C) May not drive after the 14th hour after coming on duty following one of

the 10-hour off-duty periods specified in paragraph (g)(1)(i)(A)(*1*) through (*4*) of this section; and

(D) Must exclude from the calculation of the 14-hour limit any sleeper berth period of at least 8 but less than 10 consecutive hours.

(ii) *Specific requirements.*—The following rules apply in determining compliance with paragraph (g)(1)(i) of this section:

(A) The term ''equivalent of at least 10 consecutive hours off duty'' means a period of (*1*) At least 8 but less than 10 consecutive hours in a sleeper berth, and

(*2*) A separate period of at least 2 but less than 10 consecutive hours either in the sleeper berth or off duty, or any combination thereof.

(B) Calculation of the 11-hour driving limit includes all driving time; compliance must be re-calculated from the end of the first of the two periods used to comply with paragraph (g)(1)(ii)(A) of this section.

(C) Calculation of the 14-hour limit includes all time except any sleeper-berth period of at least 8 but less than 10 consecutive hours; compliance must be re-calculated from the end of the first of the two periods used to comply with the requirements of paragraph (g)(1)(ii)(A) of this section.

(2) *Specially trained driver of a specially constructed oil well servicing commercial motor vehicle at a natural gas or oil well location.* A specially trained driver who operates a commercial motor vehicle specially constructed to service natural gas or oil wells that is equipped with a sleeper berth, as defined in §§ 395.2 and 393.76 of this subchapter, or who is off duty at a natural gas or oil well location, may accumulate the equivalent of 10 consecutive hours off duty time by taking a combination of at least 10 consecutive hours of off-duty time, sleeper-berth time, or time in other sleeping accommodations at a natural gas or oil well location; or by taking two periods of rest in a sleeper berth, or other sleeping accommodation at a natural gas or oil well location, providing:

(i) Neither rest period is shorter than 2 hours;

(ii) The driving time in the period immediately before and after each rest period, when added together, does not exceed 11 hours;

(iii) The driver does not drive after the 14th hour after coming on duty following 10 hours off duty, where the 14th hour is calculated:

(A) By excluding any sleeper berth or other sleeping accommodation period of at least 2 hours which, when added to a subsequent sleeper berth or other sleeping accommodation period, totals at least 10 hours, and

(B) By including all on-duty time, all off-duty time not spent in the sleeper berth or other sleeping accommodations, all such periods of less than 2 hours, and any period not described in paragraph (g)(2)(iii)(A) of this section; and

(iv) The driver may not return to driving subject to the normal limits under § 395.3 without taking at least 10 consecutive hours off duty, at least 10 consecutive hours in the sleeper berth or other sleeping accommodations, or a combination of at least 10 consecutive hours off duty, sleeper berth time, or time in other sleeping accommodations.

(3) Passenger-carrying commercial motor vehicles. A driver who is driving a passenger-carrying commercial motor vehicle that is equipped with a sleeper berth, as defined in §§ 395.2 and 393.76 of this subchapter, may accumulate the equivalent of 8 consecutive hours of off-duty time by taking a combination of at least 8 consecutive hours off-duty and sleeper berth time; or by taking two periods of rest in the sleeper berth, providing:

* * * * *

(h) *State of Alaska*—(1) *Property-carrying commercial motor vehicle.* The provisions of § 395.3(a) and (b) do not apply to any driver who is driving a commercial motor vehicle in the State of Alaska. A driver who is driving a property-carrying commercial motor vehicle in the State of Alaska must not drive or be required or permitted to drive—

(i) More than 15 hours following 10 consecutive hours off duty; or

(ii) After being on duty for 20 hours or more following 10 consecutive hours off duty.

(iii) After having been on duty for 70 hours in any period of 7 consecutive days, if the motor carrier for which the driver drives does not operate every day in the week; or

(iv) After having been on duty for 80 hours in any period of 8 consecutive days, if the motor carrier for which the driver drives operates every day in the week.

(2) *Passenger-carrying commercial motor vehicle.* The provisions of § 395.5 do not apply to any driver who is driving a passenger-carrying commercial motor vehicle in the State of Alaska. A driver who is driving a passenger-carrying commercial motor vehicle in the State of Alaska must not drive or be required or permitted to drive—

(i) More than 15 hours following 8 consecutive hours off duty;

(ii) After being on duty for 20 hours or more following 8 consecutive hours off duty;

(iii) After having been on duty for 70 hours in any period of 7 consecutive days, if the motor carrier for which the driver drives does not operate every day in the week; or

(iv) After having been on duty for 80 hours in any period of 8 consecutive days, if the motor carrier for which the driver drives operates every day in the week.

(3) A driver who is driving a commercial motor vehicle in the State of Alaska and who encounters adverse driving conditions (as defined in § 395.2) may drive and be permitted or required to drive a commercial motor vehicle for the period of time needed to complete the run.

(i) After a property-carrying commercial motor vehicle driver completes the run, that driver must be off duty for at least 10 consecutive hours before he/she drives again; and

(ii) After a passenger-carrying commercial motor vehicle driver completes the run, that driver must be off duty for at least 8 consecutive hours before he/she drives again.

* * * * *

(j) *Travel time*—(1) When a property-carrying commercial motor vehicle driver at the direction of the motor carrier is traveling, but not driving or assuming any other responsibility to the carrier, such time must be counted as on-duty time unless the driver is afforded at least 10 consecutive hours off duty when arriving at destination, in which case he/she must be considered off duty for the entire period.

(2) When a passenger-carrying commercial motor vehicle driver at the direction of the motor carrier is traveling, but not driving or assuming any other responsibility to the carrier, such time must be counted as on-duty time unless the driver is afforded at least 8 consecutive hours off duty when arriving at destination, in which case he/she must be considered off duty for the entire period.

(k) *Agricultural operations.* The provisions of this part shall not apply to drivers transporting agricultural commodities or farm supplies for agricultural purposes in a State if such transportation:

(1) Is limited to an area within a 100 air-mile radius from the source of the commodities or the distribution point for the farm supplies, and

(2) Is conducted during the planting and harvesting seasons within such State, as determined by the State.

* * * * *

(o) *Property-carrying driver.* A property-carrying driver is exempt from the requirements of § 395.3(a)(2) if:

(1) The driver has returned to the driver's normal work reporting location and the carrier released the driver from duty at that location for the previous five duty tours the driver has worked;

(2) The driver has returned to the normal work reporting location and the carrier releases the driver from duty within 16 hours after coming on duty following 10 consecutive hours off duty; and

(3) The driver has not taken this exemption within the previous 6 consecutive days, except when the driver has begun a new 7- or 8-consecutive day period with the beginning of any off-duty period of 34 or more consecutive hours as allowed by § 395.3(c).

n 8. Section 395.3 is revised to read as follows:

§ 395.3 Maximum driving time for property-carrying vehicles.

Subject to the exceptions and exemptions in § 395.1:

(a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle:

(1) More than 11 cumulative hours following 10 consecutive hours off duty; or

(2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of § 395.1(o) or § 395.1(e)(2).

(b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after—

(1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

(c)(1) Any period of 7 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours; or

(2) Any period of 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours.

n 9. Section 395.5 is revised to read as follows:

§ 395.5 Maximum driving time for passenger-carrying vehicles.

Subject to the exceptions and exemptions in § 395.1:

(a) No motor carrier shall permit or require any driver used by it to drive a passenger-carrying commercial motor vehicle, nor shall any such driver drive a passenger-carrying commercial motor vehicle:

(1) More than 10 hours following 8 consecutive hours off duty; or

(2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.

(b) No motor carrier shall permit or require a driver of a passenger-carrying commercial motor vehicle to drive, nor shall any driver drive a passenger-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after—

(1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

n 10. Section 395.13 paragraphs (c)(1)(ii) and (d)(2) are revised to read as follows:

§ 395.13 Drivers declared out of service.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(ii) Require a driver who has been declared out of service for failure to prepare a record of duty status to operate a commercial motor vehicle until that driver has been off duty for the appropriate number of consecutive hours required by this part and is in compliance with this section. The appropriate consecutive hours off-duty may include sleeper berth time.

* * * * *

(d) * * *

(1) * * *

(2) No driver who has been declared out of service, for failing to prepare a record of duty status, shall operate a commercial motor vehicle until the driver has been off duty for the appropriate number of consecutive hours required by this part and is in compliance with this section.

n 11. Section 395.15(j)(2)(ii) is revised to read as follows:

§ 395.15 Automatic on-board recording devices.

* * * * *

(j) * * *

(2) * * *

(i) * * *

(ii) The motor carrier has required or permitted a driver to establish, or the driver has established, a pattern of exceeding the hours of service limitations of this part;

* * * * *

Issued on: August 16, 2005.

Annette M. Sandberg,

Administrator.

[FR Doc. 05–16498 Filed 8–19–05; 12:00 pm]

BILLING CODE 4910–EX–P

Federal Register

Thursday,
August 25, 2005

Part III

Election Assistance Commission

Publication of State Plans Pursuant to the Help America Vote Act; Notice

ELECTION ASSISTANCE COMMISSION

Publication of State Plans Pursuant to the Help America Vote Act

AGENCY: U.S. Election Assistance Commission (EAC).

ACTION: Notice.

SUMMARY: Pursuant to sections 254(a)(11)(A) and 255(b) of the Help America Vote Act (HAVA), Public Law 107–252, the U.S. Election Assistance Commission (EAC) hereby causes to be published in the **Federal Register** material changes to the HAVA State plans previously submitted by Montana, Nevada, and South Carolina.

DATES: This notice is effective upon publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Bryan Whitener, Telephone 202–566–3100 or 1–866–747–1471 (toll-free).

Submit Comments: Any comments regarding the plans published herewith should be made in writing to the chief election official of the individual States at the address listed below.

SUPPLEMENTARY INFORMATION: On March 24, 2004, the U.S. Election Assistance Commission published in the **Federal Register** the original HAVA State plans filed by the fifty States, the District of Columbia and the Territories of American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands. 69 FR 14002. HAVA anticipated that States, Territories and the District of Columbia would change or update their plans from time to time pursuant to HAVA section 254 (a)(11) through (13). HAVA sections 254(a)(11)(A) and 255 require EAC to publish such updates.

The submissions from Montana, Nevada, and South Carolina address material changes in the administration of their previously submitted State plans and, in accordance with HAVA section 254(a)(12), provide information on how the State succeeded in carrying out the previous State plan. Montana is submitting a revised budget to address how the State plans to use its 2004 requirements payment. The State also references adjustments to voter education programs, to programs providing access to voters with disabilities, to provisional voting and voter identification processes, and to voting system requirements. Nevada and South Carolina are submitting revised budgets to account for the shortfall in the amount of requirements payments received. Montana's submission is the first amendment to the State's original plan. Nevada and South Carolina had filed amended State plans that were published in the **Federal Register** on September 30, 2004. 69 FR 58630.

Upon the expiration of thirty days from August 25, 2005, these States will be eligible to implement any material changes addressed in the plans that are published herein, in accordance with HAVA section 254(a)(11)(C). At that time, in accordance with HAVA section 253(d), Montana also may file a statement of certification to obtain a fiscal year 2004 requirements payment. This statement of certification must confirm that the State is in compliance with all of the requirements referred to in HAVA section 253(b) and must be provided to the Election Assistance Commission in order for the State to receive a requirements payment under HAVA Title II, Subtitle D.

EAC notes that the plans published herein have already met the notice and comment requirements of HAVA section 256, as required by HAVA section 254(a)(11)(B). EAC wishes to acknowledge the effort that went into the revising the State plans and encourages further public comment, in writing, to the State election official of the individual States listed below.

Thank you for your interest in improving the voting process in America.

Chief State Election Officials

Montana

The Honorable Brad Johnson, Secretary of State, P.O. Box 202801, Helena, MT 59620–2801, Phone: 406–444–4732, Fax: 406–444–2023, Email: *soselection@state.mt.us*.

Nevada

The Honorable Dean Heller, Secretary of State, 101 N. Carson Street, Suite 3, Carson City, NV 89701, Phone: 775–684–5705, Fax: 775–684–5718, Email: *nvelect@sos.nv.gov*.

South Carolina

Ms. Marci Andino, Executive Director, State Election Commission, P.O. Box 5987, Columbia, SC 29250–5987, Phone: 803–734–9060, Fax: 803–734–8366, E-mail: *elections@elections.sc.gov*.

Dated: August 17, 2005.

Gracia M. Hillman,

Chair, U.S. Election Assistance Commission.

BILLING CODE 6820–KF–U

MONTANA SECRETARY OF STATE
Brad Johnson

Elections Bureau
(406) 444-5346
soselection@mt.gov

Montana State Capitol
2nd Floor, Room 260
P.O. Box 202801
Helena, MT 59620-2801

August 1, 2005

US Election Assistance Commission
Attn: EAC Chair, Gracia Hillman
1225 New York Ave, NW - Ste 1100
Washington, DC 20005

Dear Members of the Commission:

In accordance with section 255 of the Help America Vote Act of 2002 (HAVA), I am pleased to file with the Election Assistance Commission (EAC) this letter and the following amendments for publication in the *Federal Register*. The original plan and these new pages will constitute the 2003 Montana HAVA Plan as Amended.

As required by section 254(a)(12) of HAVA, the amendments describe the material changes that Montana has made to the 2003 Montana HAVA Plan.

After consulting with EAC staff, Montana is providing the amendments to the original 2003 Montana HAVA Plan, without the full text of the original Plan. Instead, we would direct the EAC and members of the public to the Secretary of State's website, http://sos.mt.gov/css/ELB/Hava.asp, to view the complete 2003 Montana HAVA Plan as Amended. The amendments are incorporated into the original plan.

The 2003 Montana HAVA Plan as Amended was developed in accordance with section 255 of HAVA and with the requirements for public notice and comment prescribed by section 256 of HAVA.

On behalf of the Montana Secretary of State's Office, I thank the Commission for its assistance and I look forward to our continued partnership to ensure fair elections.

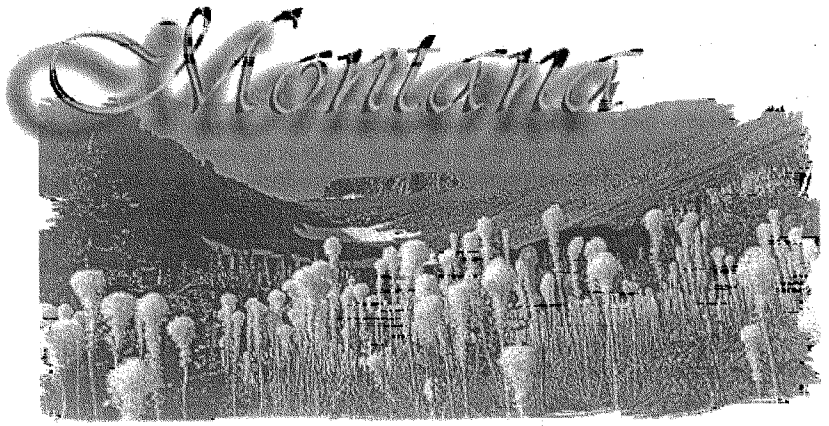
Sincerely,

Brad Johnson
Montana Secretary of State

FINAL

2003 Montana HAVA Plan

AS AMENDED



HELP AMERICA VOTE ACT OF 2002 (HAVA)

August 1, 2005

MONTANA
SECRETARY OF STATE
BRAD JOHNSON

2003 MONTANA HAVA PLAN AMENDMENTS

Section 301 Voting System Standards (page 8 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: Since the adoption of the 2003 Montana HAVA Plan, several counties have purchased precinct counters that notify voters if there are problems with their ballots. The secretary of state decided that the mailing of the Voter Information Pamphlet, which occurs at least 30 days before even-year general elections, would be sufficient to reach registered voters without a special mailing to all postal patrons. The state intends to meets the private and independent provision for verifying votes as completely as possible through the use of precinct counters and voting systems equipped for individuals with disabilities.

Planned Action: With current funds and the expected $7,446,803 Federal payment, the state will continue the activities referenced in the 2003 Montana HAVA Plan. The state will continue to assist counties in purchasing precinct counters. A major purchase will be the voting systems equipped for individuals with disabilities, to be located in each polling place. The systems will verify how voters cast their ballots, prevent overvotes and notify voters of undervotes, and will meet HAVA requirements.

Casting and Correcting Ballots (page 8 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: The secretary of state facilitated voting by assisting counties with buying precinct counters. During the 2005 Legislature, the secretary of state successfully advocated legislation, in House Bill 177, to more clearly define whether a vote is counted and what constitutes an overvote and an undervote, and to clarify the challenge provisions in state law.

In a meeting in March 2005, the state Election Reform Advisory Committee suggested using Public Service Announcements (PSAs) to promote the correct way to mark a ballot, the importance of voting, and how voting machines work to make every vote count. Committee members discussed how ballot counting machines might read "hesitation marks" as a vote, undervote, or set the ballot aside to be interpreted by the appropriate committee, and suggested using more precinct count systems.

Planned Action: The state will continue to assist counties in purchasing precinct counters to alert voters to possible ballot errors, and will provide a more extensive program to educate voters on casting a vote correctly and on asking for a new ballot if they spoil their ballots.

Audit Capacity for Voting Systems (page 9 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: The 2005 Legislature has enacted the requirement that any approved voting systems must use a paper ballot that allows votes to be manually counted, except that a direct recording electronic system that does not mark a paper ballot may be used to facilitate voting by a voter with a disability under certain conditions. These conditions allow for the possibility that a direct recording electronic system that uses a paper ballot may not have been certified by the federal election assistance commission by the time of the purchase of the system, or a direct recording electronic system that marks a paper ballot may not have been approved by the secretary of state by the time of purchase. In either of these cases, the system must still record votes in a manner that will allow the votes to be printed and manually counted or audited if necessary.

Planned Action: The state plans to purchase voting systems consistent with HAVA and the requirements above. Rules will be drafted that will be consistent with HAVA and state law.

Direct Recording Electronic Systems (page 9 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: The purchase of voting systems equipped for individuals with disabilities and associated educational efforts have not yet occurred due to a requested and approved waiver until 2006. The voting system vendor fair in August 2005 will be essential to ensure the participation of people with disabilities (and the people who serve them) in the selection of the systems. Montana discussed the possibility of a buying pool with other states but determined that due to varying state laws this would not be feasible.

Planned Action: The secretary of state plans to purchase voting systems equipped for individuals with disabilities in the year 2005 for use in elections starting in 2006. Public outreach on the systems is being scheduled and our Communication Plan will assist the secretary of state in targeting and reaching influential people around the state for education on the systems. Information about the purposes and proper use of the systems will be included in educational events and materials.

Accessibility (page 10 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: Many of Montana's polling places meet requirements for physical access, a number which has increased through the assistance of organizations that serve people with disabilities. The secretary of state's office contracted with the Montana Advocacy Program to review polling places for accessibility and to assist counties in making their polling places more accessible. The secretary of state's office provided funding for the Montana Council on Developmental Disabilities to provide transportation to the polls on election day. The office also provided community-based organization grants to agencies that serve persons with disabilities to ensure that they could get the word out to their members and clients about accessibility. See Accessibility under Appendix C for relevant legislation.

In a meeting in March 2005, the state Election Reform Advisory Committee suggested the use of HAVA money to promote understanding and the need to make polling places accessible, especially county election offices. The committee discussed using funds for temporary accessibility accessories, as long as the main emphasis is on permanent accessibility.

Other specific suggestions included training election judges on the appropriate language and terms for communicating with persons with disabilities and on answering potential questions from persons with disabilities; training election judges on how things like moving a bench can make a polling place more accessible; training educators and students about the HAVA changes and the importance of accessibility; using the secretary of state's office to recruit, train, and oversee people to help with the systems equipped for individuals with disabilities; and training for use of CPR and defibrillators at polling places.

Planned Action: The state will, as fully as possible, implement the recommendations of the Election Reform Advisory Committee through training, rules and/or handbooks.

The state will continue to contract with the Montana Advocacy Program to train counties in completing accessibility surveys and ADA self-evaluation. The secretary of state's office will provide grants for the counties for consulting services, polling place accessibility, and additional education. We will work closely with Independent Living Centers and other organizations that serve people with disabilities and senior citizens to secure and train election judges who are members of these groups and who work with members of these groups. We will provide funds to employ election judges who are specially trained to assist the elderly and people with disabilities.

At the suggestion of advocates for senior citizens, we will recommend the increased use of assisted living centers as polling places, in order to better serve the aging population of Montana. We will also encourage election administrators to continue to issue duplicate voter cards, which are accepted as identification, to people who may have lost them. We intend to work with senior citizen focus groups to "field test" new programs as applicable.

Error Rates (page 10 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: No changes.

Planned Action: We will as necessary draft rules specifying machine error rates.

Rules and Laws (pages 10-11 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: See Rules and Laws under Appendix C for relevant legislation.

Planned Action: Rules are necessary and will be written to implement new legislation and to specify the requirements for the statewide voter registration database and for systems equipped for individuals with disabilities.

Section 302 Provisional Voting and Voting Information Requirements (pages 11-12 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: The secretary of state requested and received a waiver until 2006 for the statewide voter registration database, so this has not yet been used to verify provisional voters. However, the secretary of state contracted with the state Motor Vehicle Division to verify driver's license numbers given by people at the polling places as part of their form of identification. This was quite successful in reducing the number of provisional ballots. Counties notified voters in person, by mail and/or by phone to inform them whether their votes were counted.

Planned Action: The state will continue the actions specified in the 2003 Montana HAVA Plan and will implement the changes to the provisional and identification voting process mandated by the 2005 Legislature. The state will work to ensure that all counties are following the posting requirements of HAVA by again sending all counties a list of those requirements.

Section 303 Computerized Statewide Voter Registration List (pages 12-13 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: The state has selected a vendor for the statewide voter registration system and is determining technical requirements.

Planned Action: The secretary of state will implement the required system by January 1, 2006. This will occur through regional trainings, opportunities for all counties to voice concerns, comments, and support for the system, testing of the system, and on-site installation of the system.

Section 303 (b) Requirements for Voters Who Register by Mail (page 14 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: No material changes.

Planned Action: No material changes.

Requirements Payments (pages 14-15 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: The state followed the procedures in the 2003 Montana HAVA Plan, with minor changes consistent with HAVA provisions, as described in the amendments to the Budget Breakdown.

Planned Action: The state will make minor changes in its spending, consistent with HAVA provisions. These changes are detailed in the Planned Action section of the Budget Breakdown.

Programs for Voter Education, Election Official Education Training, and Poll Worker Training (pages 15-17 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: The secretary of state provided grants of $5,000 each to over 90 community-based organizations to assist with education. After consideration, the state chose not to develop a "history trunk," did not include HAVA information in utility bills, and did not send a flyer to all postal patrons regarding HAVA, because ongoing efforts were determined to be sufficient.

Planned Action: The secretary of state will continue the efforts in the 2003 Montana HAVA Plan and intends also to develop a civics curriculum in order to educate young people about the importance of civic participation and voting. The state does not plan to award additional grants to community-based organizations. Our Communication Plan will assist us in targeting groups for education outreach, especially regarding new voting systems equipped for people with disabilities.

Voting System Guidelines (pages 17-18 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: The Montana Legislature adopted new standards and requirements regarding voting systems.

Planned Action: The secretary of state will write system standards and adopt any other necessary system standards through the rulemaking process. The state will adopt additional rules clarifying whether a vote is counted.

HAVA Election Fund (page 18 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: No changes.

Planned Action: No changes.

HAVA Budget (pages 18-19 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: No changes.

Planned Action: The state is requesting additional funding in the amount of approximately $7,446,803 for upcoming HAVA expenses.

Voting Accessibility (page 19 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: The estimate of $350,000 was nearly exact. The cost of replacing county punch card systems was $360,000. The voting systems equipped for individuals with disabilities have not yet been purchased.

Planned Action: The state has completed the punch-card buyout. Our current estimate of the cost of voting systems equipped for individuals with disabilities is $2,800,000, all of which is expected to come from our original $9,150,000 Federal payment. Additional costs are estimated at $500,000 and will come from our expected $7,446,803 Federal payment. Costs for assessing and implementing polling place accessibility are estimated at $2,000,000 and will also come from the expected $7,446,803 Federal payment.

Provisional Balloting (pages 19-20 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: No material changes.

Planned Action: The state will continue to implement provisional balloting. The state will especially assist counties in ensuring their continuing familiarity with the polling place elector identification form, used for electors who do not provide another form of identification.

Voter Education, Election Official and Poll Worker Training (page 20 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: The state spent a total of approximately $1,435,989.37 on Voter Education, Election Official and Poll Worker Training. This included community-based organization grants, HAVA trainings across the state, an extensive media campaign, and voter education activities at popular events.

Planned Action: We intend to continue most of the activities specified in the 2003 Montana HAVA Plan. We do not plan to award additional grants to community-based organizations. We are drafting a Communication Plan to target and reach groups and organizations to give them new election information, especially regarding new voting systems equipped for persons with disabilities.

The total to be spent from the $9,150,000 Federal payment for these activities is approximately $177,233.56. The total to be spent from the expected $7,446,803 Federal payment for these activities is approximately $500,000.00.

Statewide Voter Management System (pages 20-21 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: Initial expenditures for the statewide voter system, known as Montana Votes, have been approximately $1,003,593.87.

Planned Action: The state plans to use $2,800,000 of the current $9,150,000 Federal payment to pay for the system. The state plans to use $1,500,000 of the expected $7,446,803 Federal payment to pay for ongoing maintenance and training.

Precinct Counters Matching Funds (page 21 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: The state spent a total of approximately $440,887.30 to help counties to purchase precinct counters.

Planned Action: The state plans to use $1,400,000 of the expected $7,446,803 Federal payment to assist counties in the ongoing purchases of precinct counters.

Administration costs (page 21 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: The state used its match money of $205,500 to pay for administrative costs. We used additional HAVA funds totaling approximately $132,295.90 to pay for additional administrative costs, including staffing and associated expenses.

Planned Action: The expected $7,446,803 Federal payment will require approximately $391,937 in match money. This match will be provided through counties paying a portion of costs of precinct counters. The state plans to use approximately $200,000 of the expected $7,446,803 Federal payment for additional administrative costs.

Maintenance of Systems and the "What-Ifs"(page 21 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: The state plans to use all of the $9,150,000 Federal payment on the activities specified.

Planned Action: As noted above, the state will use all of the $9,150,000 Federal payment. The state plans to have approximately $1,346,803 of the expected $7,446,803 Federal payment left over for ongoing maintenance not covered elsewhere in the budget and for other ongoing expenses.

Budget Breakdown: (page 21 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan:

APPROXIMATE ACTUAL BUDGET BREAKDOWN:

Voting Accessibility: $360,000.00
Voter Education, Election Official and Poll Worker Training: $1,435,989.37
Statewide Voter Management System: $1,003,593.87
Precinct Counter Matching Funds: $440,887.30
Administration Costs: $132,295.90

TOTAL ACTUAL BUDGET EXPENSES: $3,372,766.44
MONEY LEFT IN ACCOUNT (for future needs): $5,777,233.56, plus interest

Planned Action:

2003 HAVA PLAN AS AMENDED ESTIMATED BUDGET BREAKDOWN:

$9,150,000 FUNDS (Approximate Amount Remaining: $5,777,233.56, plus interest)

Voting Accessibility: $2,800,000.00
Voter Education, Election Official and Poll Worker Training: $177,233.56, plus interest
Statewide Voter Management System: $2,800,000.00
Precinct Counter Matching Funds: $0.00
Administration Costs: $0.00

TOTAL ESTIMATED BUDGET EXPENSES: $5,777,233.56
MONEY TO BE LEFT IN ACCOUNT (for future needs): $0.00

$7,446,803 EXPECTED FUNDS:

Voting Accessibility: $2,500,000.00
Voter Education, Election Official and Poll Worker Training: $500,000.00
Statewide Voter Management System: $1,500,000.00
Precinct Counter Matching Funds: $1,400,000.00
Administration Costs: $200,000.00
TOTAL ESTIMATED BUDGET EXPENSES: $6,100,000.00
MONEY TO BE LEFT IN ACCOUNT (for future needs): $1,346,803.00, plus interest

Maintenance of Expenditures (pages 21-22 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: No change.

Planned Action: The secretary of state will maintain expenditures at a level equal to or greater than the level of such expenditures in state FY 2000. The secretary of state and counties will also continue to provide maintenance of effort.

Performance Goals and Measures (pages 22-26 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: The survey on provisional ballots used county results instead of precinct results, due to the low number of provisional ballots and to avoid the possibility of voter secrecy being compromised in certain precincts. The public was not surveyed to determine their awareness of their voting rights and responsibilities; the low incidence of difficulties at the polling places indicated that their level of awareness was quite high.

After the initial 2004 primary election survey, Montana added more detailed questions for the 2004 general election survey, at the suggestion of interested groups. These questions helped the state to get an even more detailed picture of the election than was requested by the federal government in a similar election survey.

Planned Action: We will continue to satisfy the performance measures detailed in the 2003 Montana HAVA Plan and will satisfy the performance measures listed in the Plan that are coming due in the future.

Administrative Complaint Procedures (pages 26-27 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: No material changes.

Planned Action: No material changes.

Activities Under Title I Payments (pages 27-28 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: The secretary of state did not act as contract administrator for purchases of systems to replace punch-card machines due to potential variations in the systems desired by the counties. The secretary of state is in the process of implementing the statewide system discussed in the plan, by the applicable deadline.

Planned Action: The secretary of state will implement the required statewide voter management system by January 1, 2006, through planned trainings, opportunities for all counties to voice concerns, comments, and support for the system, extensive testing of the system, and on-site installation of the system in each county.

Ongoing Management of HAVA Plan (page 28 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: The secretary of state conducted a meeting in November 2003 to review the standards and goals of the 2003 Montana HAVA Plan, reviewed Plan procedures at an annual convention of election officials in September 2004, and conducted meetings on March 17, 2005, and June 3, 2005 with Election Reform Advisory Committee members and county election administrators to solicit and review proposed amendments to the 2003 Montana HAVA Plan. This 2003 Montana HAVA Plan As Amended was submitted for public comment for at least 30 days.

Planned Action: This 2003 Montana HAVA Plan As Amended will be submitted for publication in the Federal Register.

Changes from the State Plan for the Previous Fiscal Year (page 29 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: This 2003 Montana HAVA Plan As Amended is the update to the 2003 Montana HAVA Plan.

Planned Action: Summaries of the 2003 Montana HAVA Plan successes are attached as Appendix C. The state will submit the 2003 Montana HAVA Plan As Amended for publication in the Federal Register.

Election Reform Advisory Committee and Procedures Followed by the Committee (pages 29-30 of 2003 Montana HAVA Plan)

Amendments to the 2003 Montana HAVA Plan: No material changes.

Planned Action: The state will announce the locations where this 2003 Montana HAVA Plan As Amended is available and will again ask media groups to publish the plan or announce its availability. Additionally, as part of the Communication Plan adopted by the state we will contact the interested parties identified in that plan and advise them of the plan's availability.

Appendix A

Amendments to the 2003 Montana HAVA Plan: No material changes.

Planned Action: The state has met or is on schedule to meet the requirements specified in Appendix A.

Appendix B

Amendments to the 2003 Montana HAVA Plan: The following bills relevant to HAVA passed during the 2005 legislature:

House Bill 177: http://data.opi.state.mt.us/bills/2005/billhtml/HB0177.htm
House Bill 297: http://data.opi.state.mt.us/bills/2005/billhtml/HB0297.htm
Senate Bill 88: http://data.opi.state.mt.us/bills/2005/billhtml/SB0088.htm
Senate Bill 302: http://data.opi.state.mt.us/bills/2005/billhtml/SB0302.htm
Senate Bill 500: http://data.opi.state.mt.us/bills/2005/billhtml/SB0500.htm

Planned Action: The state will advocate legislation as needed in the future that is consistent with the provisions of HAVA.

Description of How Montana Succeeded in Carrying Out the 2003 Montana HAVA Plan

Section 301 Voting System Standards: Montana assisted a number of counties in purchasing precinct counters and initiated a statewide voter education program consistent with the goal of educating voters to request a new ballot if they overvoted or spoiled their ballots. Voter education materials were made available on request in multi-accessible formats and HAVA information was placed on the secretary of state's website. The secretary of state worked with county election administrators to ensure that they continued to provide instructions to voters that were tailored for each system used by the voters. Voter education information specific to HAVA was placed in the first few pages of the Voter Information Pamphlet sent to all voters.

Casting and Correcting Ballots: The state has continued to follow the procedures in the 2003 Montana HAVA Plan and has strengthened its policies by purchasing precinct counters and through education programs. During the 2005 Legislative Session, the secretary of state successfully advocated legislation, in House Bill 177, to more clearly define whether a vote is counted, to define overvotes and undervotes, and to clarify the challenge provisions in state law.

Audit Capacity for Voting Systems: 2005 Legislative Update: Under HB 297, the 2005 Legislature has enacted the requirement that any approved voting systems must use a paper ballot that allows votes to be manually counted, except that a direct recording electronic system that does not mark a paper ballot may be used to facilitate voting by a voter with a disability under certain conditions. These conditions allow for the possibility that a direct recording electronic system that uses a paper ballot may not have been certified by the federal election assistance commission by the time of the purchase of the system, or a direct recording electronic system that marks a paper ballot may not have been approved by the secretary of state by the time of purchase. In either of these cases, the system must still record votes in a manner that will allow the votes to be printed and manually counted or audited if necessary.

Direct Recording Electronic Systems: Plans are in place to select a vendor for voting systems equipped for individuals with disabilities and to implement the systems statewide.

Accessibility: In regard to access for the disabled, the secretary of state's office continued the ongoing efforts specified in the plan; contracted with the Montana Advocacy Program, which advocates for persons with disabilities, to provide funds and consulting services to help make more polling places accessible; and provided funding for the Montana Council on Developmental Disabilities to provide transportation to the polls on election day. We also provided community-based organization grants to agencies that serve persons with disabilities to ensure that they could get the word out to their members and clients about these options. The secretary of state's office continued to provide alternative language accessibility and educated the public and election officials regarding HAVA accessibility requirements.

2005 Legislative Update: The Legislature passed Senate Bill 500, requiring that polling places approved on or after the effective date of SB 500 must comply with the accessibility standards in the Americans with Disabilities Act of 1990. The bill also provides that when an elector with a disability enters a polling place, an election judge will ask the elector if the elector wants assistance, and it allows election officials to accept a number of substitutes in place of a signature from an elector with a disability. Another bill, Senate Bill 88, which allows electors to request that absentee ballots be sent to them automatically, may especially help facilitate voting by individuals with disabilities.

Error Rates: Our error rates currently comply with the applicable error rate standards.

Rules and Laws: The Elections Task Force Committee proposed rules to define what constitutes a vote, and revised the voter registration forms to meet HAVA requirements. The legislative bills mentioned in the 2003 Montana HAVA Plan were implemented successfully through numerous meetings with county election administrators, changes to applicable forms, directives to county election administrators, and extensive training and education.

2005 Legislative Update: The 2005 Legislature passed a number of bills to amend laws applicable to HAVA, including those discussed under Casting and Correcting Ballots, Audit Capacity for Voting Systems, and Accessibility. Additionally, pursuant to Senate Bill 302, as of July 1, 2006, people who do not register before the 30-day period before an election will be allowed to register and vote at the election administrator's office. Also, legally registered electors who do not provide identification and who do not fill out a verified identification form will have their votes counted if the county election administrator can verify their signature on their provisional ballot from their signature on file.

Section 302 Provisional Voting and Voting Information Requirements: County election administrators assisted with the trainings on provisional and identification voting and produced materials for use by counties. The provisional voting and identification requirements were fully implemented, with few concerns brought to the attention of the secretary of state, and the county election administrators and county election judges were trained extensively on the applicable procedures. The secretary of state produced and arranged for the airing of a series of related Public Service Announcements and provided grants to over 90 community-based organizations to provide information to their membership, their clients, and the general public.

The secretary of state prescribed forms for the counties to use in providing information to voters about casting regular and provisional ballots, information about identification, and general information on voting rights and federal and state law, and developed sample provisional voting instructions for counties to give to each provisional voter. The secretary of state developed a poster sent to county election administrators for all polling locations to provide information about the identification requirements.

The secretary of state contracted with the state Motor Vehicle Division to verify driver's license numbers given by people at the polling places as part of their form of identification. This was quite successful in reducing the number of provisional ballots. Counties notified voters in person, by mail and/or by phone to inform them whether their votes were counted.

Section 303 Computerized Statewide Voter Registration List: All current plans for the system are consistent with the intentions stated in the 2003 Montana HAVA Plan. The state has selected a vendor and is in the process of testing the system.

Section 303 (b) Requirements for Voters Who Register by Mail: This part of the plan was fully implemented. At the suggestion of advocacy groups, the state revised the first amended form to specifically list all the acceptable forms of identification. Montana required identification of all voters, and the form states this requirement.

Requirements Payments: The state followed the 2003 Montana HAVA Plan, with minor changes consistent with HAVA provisions, as described in the amendments to the Budget Breakdown.

Programs for Voter Education, Election Official Education Training, and Poll Worker Training: The state has engaged in almost all of the activities proposed in the 2003 Montana HAVA Plan, conducting extensive election administrator and election judge trainings and saturating the airwaves with information about identification and provisional voting. The secretary of state provided grants of $5,000 each to over 90 community-based organizations to assist with education efforts. All counties received training videos and were offered and generally accepted in-person training. The secretary of state worked with educators to ensure that students and educators were aware of the changes to state and federal laws.

Voting System Guidelines: The secretary of state's office is on schedule for implementation of voting systems equipped for individuals with disabilities in 2006. The secretary of state continues to meet most of the voting system requirements and will continue to create new procedures for standards under HAVA. The secretary of state has adopted language on what constitutes a vote.

HAVA Election Fund: As noted in the 2003 Montana HAVA Plan, the secretary of state created an account for HAVA funds, and all spending of such funds has been in accordance with state and federal law.

HAVA Budget: Spending has been consistent with the budget in the 2003 Montana HAVA Plan, with material amendments specified in the 2003 Montana HAVA Plan As Amended.

Maintenance of Expenditures: The secretary of state maintained expenditures of the state for activities funded by the payment at a level equal to or greater than the level of such expenditures in state FY 2000. The secretary of state and counties provided maintenance of effort.

Performance Goals and Measures: The secretary of state fully implemented the punch card buyout, is in the process of selecting vendors for voting systems equipped for individuals with disabilities, selected a vendor for the statewide voter registration management system, implemented provisional balloting and surveys, and actively educated voters, election officials, and poll workers. Turnout was up 11 percent from the last presidential general election, and more voters cast ballots in the 2004 general election than ever before in Montana.

Administrative Complaint Procedures: The procedures were fully implemented by rules, with minor amendments.

Activities Under Title I Payments: As proposed in the plan, the secretary of state worked with county election administrators in the five remaining counties still using punch-card machines to replace the machines with optical-scan systems. The secretary of state is in the process of implementing the statewide voter registration management system discussed in the plan, by the applicable deadline.

Ongoing Management of HAVA Plan: The secretary of state conducted a meeting in November 2003 to review the standards and goals of the HAVA plan, another in September 2004 to further review state and county progress on HAVA, and conducted meetings on March 17, 2005 and on June 3, 2005 with Election Reform Advisory Committee members and county election administrators to solicit and review proposed amendments to the 2003 Montana HAVA Plan.

Changes from the State Plan for the Previous Fiscal Year: The 2003 Montana HAVA Plan As Amended is the update to the 2003 Montana HAVA Plan.

Election Reform Advisory Committee and Procedures Followed by the Committee: In addition to the steps outlined in the 2003 Montana HAVA Plan and completed at the time of the adoption of the Plan, the secretary of state announced the locations where the Plan was available and asked media groups to publish the plan or announce its availability as a public service announcement.

Appendix A: The state met or is on schedule to meet the requirements specified in Appendix A.

Appendix B: The secretary of state advocated legislation to better implement the provisions of HAVA.

DEAN HELLER
Secretary of State

RENEE L. PARKER
Chief Deputy Secretary of State

PAMELA A. RUCKEL
Deputy Secretary for Southern Nevada

STATE OF NEVADA

OFFICE OF THE
SECRETARY OF STATE

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Securities Administrator

SCOTT W. ANDERSON
Deputy Secretary for Commercial Recordings

ELLICK C. HSU
Deputy Secretary for Elections

August 1, 2005

Gracia Hillman
Chair
U.S. Election Assistance Commission
1225 New York Ave. NW, Suite 1100
Washington, DC 20005

Re: Nevada's State Plan for FY 2005-2006

Dear Chairwoman Hillman:

Nevada hereby submits to you the State Plan for FY 2005-2006 it has developed pursuant to § 254 of the Help America Vote Act of 2002, P.L. 107-252 (HAVA).

We thank you in advance for arranging for publication in the Federal Register pursuant to § 255 of HAVA.

Please send confirmation that you have received the Plan, and feel free to contact me if you have any questions or concerns.

Respectfully,

DEAN HELLER
Secretary of State

Ellick C. Hsu, Esq.
Deputy Secretary for Elections

Cc: Peggy Sims, Election Assistance Commission (*By E-Mail: psims@eac.gov)*

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State of Nevada

Fiscal Year 2005-2006

State Plan

As required by Public Law 107-252
***Help America Vote Act of 2002*, Section 253 (b)**

Office of the Nevada Secretary of State
101 N. Carson Street, Suite 3
Carson City, NV 89701
July 17, 2005

STATE OF NEVADA
FISCAL YEAR 2005-2006
STATE PLAN

I. INTRODUCTION

On October 29, 2002, President Bush signed the Help America Vote Act (HAVA or Act) into law. HAVA is a response to the irregularities in voting systems and processes unveiled during the 2000 Presidential Election. HAVA requires each state to develop a comprehensive plan for implementing the mandatory changes to the administration of elections that are called for in the legislation. HAVA will affect virtually every element of the voting process, including requiring a statewide voter registration system, replacing punch card voting machines, improving voter education and poll worker training, requiring provisional ballots, and requiring at least one voting machine available per polling place for voters with disabilities. HAVA will dramatically change the way future elections throughout the nation are conducted.

As required by HAVA, the state of Nevada (State) adopted and submitted to the federal government its first State Plan (Plan) for fiscal year (FY) 2003-04 in June 2003. Due to the delayed formation and organization of the Elections Assistance Commission (EAC), publication of that Plan in the *Federal Register* was not completed until May 2004. The following year, the State amended the Plan for FY 04-05, and after expiration of the public comment period, adopted it in July 2004. The following State Plan for the State, developed in accordance with Section 254 of the Act, represents an update to the State's FY 2004-05 plan. Like the FY 2004-05 plan, this State Plan (FY 05-06) was created under the direction of Secretary of State Dean Heller through a State Plan Advisory Committee (Advisory Committee). Nevada's FY 05-06 Plan continues to build on the framework established in previous Plans for the State to continue progress that has already been made in election reform and to achieve compliance with HAVA.

Because HAVA will have a profound impact on virtually every element of the voting process in our State, we anticipate that this plan will continue to be updated and refined periodically over the coming years to ensure the continued health of our democratic process.

II. THE BACKDROP FOR NEVADA'S STATE PLAN

The Secretary of State is the Chief Officer of Elections for the state of Nevada, and, as such, is responsible for the execution and enforcement of state and federal laws relating to elections. Although HAVA dramatically increases the election administration responsibilities for the State, the efficient function and cooperation of local governments continue to be critical to ensuring that elections are successfully conducted. Considerable time, effort, and resources on the state and local level will be necessary for the State to meet HAVA's requirements.

Nevada is one of the fastest growing states in the country. Based on figures obtained from Census 2000, Nevada's population increased by 796,424 persons between 1990 and 2000. In addition, Nevada's largest county, Clark County, continues to add

approximately 4,000 new citizens per month. From the last Plan, the number of registered voters in the State increased by approximately 200,000, and currently, the State has approximately 1.2 million registered voters spread throughout its 17 counties. Moreover, more than 1,500 state, county and municipal political campaigns come under the jurisdiction of local or state election officials during each election cycle.

All 17 counties in the State use Direct Recording Electronic (DRE) voting machines at the polling places and optical scan machines for absentee voting. Nevada's 16 counties that previously used punchcards or optical scan voting systems use DRE machines fitted with voter verifiable paper trail printers exclusively, and one county, which already had DRE machines, uses DRE machines with voter verifiable paper trail printers, along with DRE's of an earlier design that cannot accommodate the new paper trail printers. In response to the requirements outlined in HAVA, the State took steps to substantially upgrade the existing voting systems, redesign processes and provide updated and continual training for election administrators and the citizens of the State. Secretary of State Dean Heller took the first step toward achieving these goals in December 2003 by announcing the decision to purchase Direct Recording Electronic (DRE) voting machines for all Nevada counties. He also announced his mandate to include a voter verifiable paper trail on all newly purchased DRE machines for the 2004 election. The Secretary of State also issued a proclamation decertifying all punch-card voting machines in Nevada as of September 1, 2004. Nevada led the nation in the 2004 Presidential Election as the first state to implement DRE voting machines with voter verifiable paper trail printers. Nevada is on target to have its statewide voter registration system in place by January 1, 2006, as required by HAVA. Although Nevada is diligently working on meeting the requirements of HAVA within its ambitious timelines, continued meaningful election reform can only be achieved with adequate support, resources and funding from both the federal government and the Nevada State Legislature.

In developing Nevada's FY 05-06 Plan, the Advisory Committee used as guidance the goal of developing and implementing a plan that delivers a timely, accurate and accessible voting process for all Nevadans. The strategies for achieving these goals continue to be to: (1) obtain initial federal funding; (2) implement legislation fostering voter participation and compliance with HAVA; (3) conduct an assessment of the condition of the statewide voter registration process given these standards; (4) suggest changes to voting technology and processes to ensure accurate and reliable elections and voter confidence; and (5) develop and implement follow-through accountability activities and feedback mechanisms for complaints.

Nevada's FY 05-06 Plan, as presented herein, is limited to the extent State appropriations are made available, and is based on the assumption that adequate federal funding will be appropriated. While the State intends to fully comply with HAVA, if adequate federal funding is not made available, the manner in which the funds are disbursed or dedicated and the priorities given to particular projects may be altered from the information contained in this FY 05-06 Plan.

III. NEVADA'S STATE PLAN

A. Use of Requirements Payments

Section 254(a)(1) requires a description of how the State will use the requirements payment to meet the requirements of Title III, and, if applicable under section 251(a)(2)[1], to carry out other activities to improve the administration of elections. Title III requires the establishment of certain voting system standards, provisional voting, public posting of voting information, a computerized statewide voter registration list, and voter registration application modifications.

1. Voting Systems Standards

Section 301(a) establishes several voting system standards which must be met by January 1, 2006. Under this section, no waiver of the requirements is permitted.

HAVA requires each voting system in the state to: (a) permit voters to verify whom they have voted for and make changes to their vote in a private, secret and independent manner; (b) notify voters if they have overvoted, what happens in instances of an overvote, and provide the opportunity to correct the ballot; (c) ensure that any notification to the voter maintains the privacy, secrecy and independence of the voter's ballot; (d) produce a permanent paper record with manual audit capacity; (e) be accessible for the disabled through the use of at least one (1) DRE voting system placed at each polling place; (f) provide alternative language accessibility pursuant to Section 203 of the Voting Rights Act of 1965; (g) comply with error rates established by the Federal Elections Commission (FEC) as of the time HAVA was adopted; and (h) have a definition of what constitutes a vote and what will be counted. These requirements have been incorporated into Nevada statutes or regulations.

Most of the federal funding that has been appropriated to date was used to upgrade the voting systems throughout the State and to purchase new systems in order to meet the requirements of Title III. As stated above, the State has implemented a uniform DRE voting system for polling places throughout the state, though not all the DRE machines are able to be fitted with the voter verifiable paper trail printers, and a uniform system for absentee voting throughout the State. The voting system replacement was accomplished in September of 2004, in time for the 2004 Primary Election, and the new machines were used successfully in the 2004 General Election and in subsequent municipal elections.

To ensure proper training for election administrators and the voting citizens of Nevada, the State used, and depending on the availability of funds, may use additional requirements payments to help educate those individuals about the proper use of the new voting systems. Requirements payments were also used for maintaining, modifying and improving all voting systems in the State to ensure compliance with HAVA Section 301(a) standards.

[1] Reference should be to Section 251(b)(2).

2. Provisional Voting and Voting Information Requirements

Section 302 requires the establishment of provisional voting and the posting of voting information at polling places by January 1, 2004. Under this section, no waiver permitted.

HAVA requires provisional voting procedures in all states to ensure that no voter who appears at the polls and desires to vote is turned away for any reason. The State adopted legislation proposed by the Secretary of State that enacts procedures to allow for provisional voting in federal races throughout the State. The procedures[2] that were adopted meet the requirements of Section 302.

The State used requirements payments to create the free access system required by HAVA to provide voters who cast provisional ballots the ability to discover whether or not their ballot was counted, and will continue to make enhancements to the free access system in preparation for the 2006 federal elections. The State also continues to use requirements payments to develop procedures for provisional voting and to plan and conduct training and outreach concerning a voter's ability to receive and cast a provisional ballot. Finally, if adequate federal funding is available, the State may use requirements payments to assist local governments with funding offsets necessary to prepare and process provisional ballots.

In addition to provisional balloting requirements, Section 302 of HAVA mandates that a sample ballot and other voting information be posted at polling places on Election Day. Each registered voter currently receives a sample ballot in the mail prior to Election Day. In addition, the Secretary of State successfully sought a change to State law to require that all materials required by Section 302 be displayed at each polling place.[3] Nevada's "Voters' Bill of Rights[4]" was also established as part of this process. The law requires that the Voters' Bill of Rights be posted conspicuously at each polling place. The Voters' Bill of Rights is a declaration of the rights of each voter with respect to the voting process. Its premise is to ensure that each and every voter who wishes to exercise the right to vote is provided with the right to do so in an informed and nondiscriminatory manner. The county clerks designed and printed the materials to be posted in the 2004 elections, and depending on the availability of funds,the State anticipates using requirements payments to defray the cost of developing, printing and posting this information in the upcoming election cycle.

3. Computerized Statewide Voter Registration List and Requirements for Voters Who Register by Mail

Section 303 requires the establishment of a computerized statewide voter registration list, first time voters who register by mail to provide identification when they cast their ballots, and changes to be made to the voter registration application by January 1, 2004. A waiver is permitted to extend compliance with Section 303(a) to January 1, 2006.

See Nevada Revised Statutes (NRS) Sections 293.3081 through 293.3086, inclusive.
See NRS 293.3025.
See NRS 293.2543 through 293.2549, inclusive.

a. Statewide Voter Registration System (SVRS)

Section 303 of HAVA requires that all states establish a statewide computerized registration list of all eligible voters. This "single, uniform, official, centralized, interactive, computerized statewide voter registration list" must be administered at the State level and is considered the official list of legally registered voters in the State. Nevada does not currently have a statewide voter registration list. Currently, voter registration records are created and maintained separately by each local jurisdiction.

The State has purchased a compliant voter registration system to be implemented statewide and administered by the Secretary of State. The Secretary of State selected a vendor, and by adhering to an expedited design and implementation process, the statewide voter registration system is on target for completion by January 1, 2006.In accordance with Section 303(d)(1)(B) of HAVA, the State submitted its certification that Nevada could not implement the Statewide Voter Registration List requirements by January 1, 2004, and that it met the requirements for a waiver of the deadline to January 1, 2006. The State cited as reasons for the waiver the fact that it is currently implementing the uniform voting system statewide and, given the fiscal and human resources necessary to successfully conduct the upcoming federal election with these new systems, it would not be prudent to implement the statewide voter registration system in the same election cycle. The statewide voter registration system will comply with Section 303(a) of HAVA and will have the ability to interface with Nevada's Department of Motor Vehicles and other appropriate agencies, as required by HAVA.

The State will expend a large portion of its requirements payments and Title I payments to fund the creation and maintenance of the statewide voter registration system. Specifically, in addition to the basic costs of the system, the State is paying for all hardware and software necessary in connection with implementing the system, as well as required training for county and city officials in the use of the system.

b. Requirements for Voters Who Register by Mail

With respect to requirements for voters who register by mail, the State revised its voter registration form in January 2003 and again in 2004 to meet the requirements of Section 303(b).

In 2003, the Secretary of State successfully sought a modification of State law[5] to ensure that the processes associated with voter registration and verification of identification at the time of registration, or at the polls for first time voters who register by mail are HAVA compliant. The 2005 Session of the Nevada State Legislature has recently adjourned and the Secretary of State will continue to review the Plan in light of recently passed legislation and update the Plan accordingly.

[5] See NRS293.272 and 293.2725

4. Other Activities to Improve the Administration of Elections (Section 251(b)(2))

The State intends to use requirements payments to fund other activities to improve the administration of elections, including, but not limited to: (a) establishing a polling place accessibility program to ensure that all polling places in Nevada are and continue to be in compliance with the Americans with Disabilities Act[6] ("ADA"); (b) providing necessary assistance to persons with limited proficiency in the English language; (c) engaging in a variety of voter education and outreach activities, including public service announcements, voting machine demonstrations, mass mailings and other related media avenues; (d) providing election official and poll worker training initiatives; and (e) establishing poll worker recruitment programs.

The State currently does not have the personnel and technical capacity required to fully achieve HAVA compliance. Ongoing operations and maintenance of the new requirements cannot be supported with the current State and local technical infrastructure and resources. The State anticipated the need for additional technology and elections personnel in the office of the Secretary of State to ensure continued compliance with HAVA, and has filled some of the necessary positions, with the intent for additional positions to be added in late 2005 and 2006. The State will use requirements payments to fund these positions.

B. Distribution of Requirements Payments and Eligibility for Distribution

Section 254(a)(2) of the act requires a description of how the State will distribute and monitor the distribution of the requirements payment to units of local government or other entities in the State for carrying out the activities described in Section 254(a)(1), including a description of—

(A) the criteria to be used to determine the eligibility of such units or entities for receiving the payment; and

(B) the methods to be used by the State to monitor the performance of the units or entities to whom the payment is distributed, consistent with the performance goals and measures adopted under Section 254(a)(8).

The Office of the Secretary of State will centrally manage activities funded by requirements payments. The Secretary of State will be accountable for all expenditures, funding levels and program controls and outcomes. The Secretary of State, in conjunction with local election officials, will determine the appropriate level of support for local activities.

To the extent that the decision is made to distribute requirements payments to units of local government and other entities for carrying out the activities described in Section 254(a)(1), the criteria to be used for determining eligibility include, but are not limited to: (a) the priority of the project to which the distribution is intended to be applied, as it relates to complying with HAVA; (b) the extent to which the recipient is in compliance with Title III of HAVA and all other state and federal election laws; (c) the recipient must maintain its current level of funding for its elections budget outside of any HAVA funds received; (d) the recipient must cooperate with the State in maintaining the statewide voter registration list and must timely implement list purging activities and reporting as required by the Secretary of State; (e) the need for the payment to ensure continued compliance with state and federal elections laws; (f) the availability to the recipient of other funding sources, including other HAVA related grants; (g) the recipient must acknowledge that it will be required to reimburse the State for all federal funds received if it does not meet the deadlines for compliance in HAVA; and (h) the recipient must develop a comprehensive accounting plan in accordance with federal criteria for separately identifying and tracking any federal funds received. The criteria for receipt of requirements payments will be agreed to in writing in advance by the Secretary of State and the unit or entity receiving the payment.

If requirements payments are so distributed, the Secretary of State will monitor the performance of each activity funded by requirements payments on a case-by-case basis. The methods to be used by the State to monitor the performance of the payment recipients may include, without limitation: (a) requiring the recipient to prepare and submit comprehensive timely reports to the Secretary of State detailing the expenditures and their relation to complying with Title III of HAVA; (b) implementing financial controls that establish financial reporting methods; and (c) developing performance indicators on a case-by-case basis for all activities funded.

C. Voter Education, Election Official and Poll Worker Training

Section 254(a)(3) of the Act requires a description of how the State will provide for programs for voter education, election official education and training, and poll worker training which will assist the State in meeting the requirements of title III.

1. Voter Education

With voter participation and turnout declining nationally over the last twenty years, and with an increasing number of historically disenfranchised groups growing more skeptical about the power of their vote, the Secretary of State's office is making a concerted effort to expand Nevada's voter outreach and education efforts.

Clearly, citizens need to better understand the power of each and every vote. Education is the key to improving Nevada's voter participation rate. Besides doing a better job of teaching our citizens about the critical component voting plays in the success of a democracy, with the advent of new technologies—specifically, DRE voting machines—the educational process should include a well-developed plan to assist and train citizens on how to use new equipment.

By law, each registered voter in Nevada receives a sample ballot in the mail prior to each election. The Secretary of State's office has produced and published several informative brochures designed to better educate Nevada's citizens about the voter registration process, the significance of every single vote, and about the requirements of HAVA. The agency's website (http://secretaryofstate.biz) contains a wealth of information useful to individuals and groups seeking to advance voter participation and citizen knowledge of the elections process.

The Secretary of State's office issues many media advisories and news releases throughout the year specifically designed to inform prospective voters about the

[6] Public Law 336 of the 101st Congress, enacted July 26, 1990.

elections process, along with conducting public forums relating to statewide ballot questions, and recording public service announcements regarding voting equipment and other related issues.

The 2003 Legislature moved the Advisory Committee on Participatory Democracy (ACPD) under the auspices of the Secretary of State's office, and established the goals of 75 percent voter registration and 70 percent voter turnout by those registered voters in Nevada by 2008. The 10-member ACPD was appointed by the Secretary and began the ambitious task of improving voter participation in Nevada with its inaugural meeting on March 31, 2004. The ACPD has plans to create an informational website and to work with existing groups, organizations, and individuals to foster and nurture greater voter participation.

One such undertaking was the *Easy Voter Project*, a non-partisan, bi-lingual voter education website and booklet that will help many Nevada citizens better comprehend the voting process. The *Easy Voter Project* has proven to be a successful program, which has been in place in California since 1994. According to a 1996 survey, adult school and community college student voter turnout in California increased to more than 70 percent among students who were exposed to the *Easy Voter Project*. The project publishes an informative *Easy Voter Guide* and maintains a website that provides information on political parties, candidates and ballots measures, along with easy-to-follow instructions on how to register and vote. The Secretary of State partnered with private organizations and successfully published and distributed over 125,000 *Easy Voter Guides* statewide, in both English and Spanish. We anticipate conducting the *Easy Voter Project* again for the 2006 elections, as well as renewing partnerships with other entities, as discussed below.

Another voter outreach project the Secretary of State's office worked closely with is the *New Voters Project*. Sponsored by the Pew Charitable Trusts and with strong bi-partisan support from a number of civic organizations, the *New Voters Project* is a non-partisan effort that is using a strategy that encompasses the recruitment of 18 to24 year olds on college campuses, during large public events, partnerships with local businesses and door-to-door canvassing. Nevada is fortunate to have been selected as one of six target states—Colorado, Iowa, New Mexico, Oregon and Wisconsin being the other five—in which the *New Voters Project* focused its attention in the 2004 presidential election season.

There are several other voter education and outreach projects the agency has partnered with, including *National Student/Parent Mock Election* and *Smackdown Your Vote.*

2. Election Official and Poll Worker Training

Adequate training for election officials and poll workers is critical to any election being conducted successfully. It becomes even more crucial when election reform occurs. Currently, training programs in the State are predominantly localized and, in some cases, informal. The State does not have personnel available to take on the sole responsibility for providing training. Nevertheless, the Secretary of State worked with local election officials and the voting machine vendor to produce training standards to be implemented statewide for training election officials and poll workers,

such process being incorporated as part of the contract with the vendor for the new statewide voting system. Implementation of election official and poll worker training plans was a significant focus of the contract and the implementation process. All poll workers are required to adhere to these standards, and the Secretary of State intends to continue the process of updating the standards, developing new methods, and improving on the curriculum and training opportunities available to Nevada's pollworkers.

D. Voting System Guidelines and Processes

Section 254(a)(4) requires a description of how the State will adopt voting system guidelines and processes which are consistent with the requirements of Section 301.

As stated above, Section 301 requires each voting system in the state to: (a) permit voters to verify whom they have voted for and make changes to their vote in a private, secret and independent manner; (b) notify voters if they have overvoted, explain what happens in instances of an overvote, and provide the opportunity to correct the ballot; (c) ensure that any notification to the voter maintains the privacy, secrecy and independence of the voter's ballot; (d) produce a permanent paper record with manual audit capacity; (e) be accessible for the disabled through the use of at least one (1) DRE voting system placed at each polling place; (f) provide alternative language accessibility pursuant to Section 203 of the Voting Rights Act of 1965; (g) comply with error rates in effect by the FEC at the time HAVA was adopted; and (h) have a definition of what constitutes a vote and what will be counted.

Existing Nevada law now mirrors the voting system guidelines and processes set forth in HAVA. In addition, the Secretary of State is responsible for certifying voting systems for use in the State. The Secretary of State, in accordance with state law, cannot certify any voting system in the State unless it meets or exceeds the standards for voting systems established by the FEC. The Secretary of State will create new guidelines and processes as necessary to ensure all voting systems in the State continue to remain in compliance with Section 301.

E. Establishment of Election Fund

Section 254(a)(5) requires a description of how the State will establish a fund described in Section 254(b) for purposes of administering the State's activities under this part, including information on fund management.

(b) Requirements for Election Fund—

(1) Election Fund Described.—For purposes of subsection (a)(5), a fund described in this subsection with respect to a State is a fund which is established in the treasury of the State government, which is used in accordance with paragraph (2), and which consists of the following amounts:

(A) Amounts appropriated or otherwise made available by the State for carrying out the activities for which the requirements payment is made to the State under this part.

(B) The requirements payment made to the State under this part.

(C) Such other amounts as may be appropriated under law.

(D) Interest earned on deposits of the fund.

The State created a special election fund in the state treasury that provides the Secretary of State with the authority to deposit into this fund all federal HAVA dollars and state matching fund appropriations. This fund is fully compliant with Section 254(b) of HAVA. The Secretary of State works closely with the State's Budget Division and the State Controller's office to implement and enforce all fiscal controls and policies required by both state and federal law.

F. Nevada's Proposed HAVA Budget

Section 254(a)(6) requires a description of the State's proposed budget for activities under this part, based on the State's best estimates of the costs of such activities and the amount of funds to be made available, including specific information on-

(A) the costs of the activities required to be carried out to meet the requirements of Title III

(B) the portion of the requirements payment which will be used to carry out activities to meet such requirements; and

(C) the portion of the requirements payment which will be used to carry out other activities.

To assist states with meeting the new mandates imposed by HAVA, Congress authorized a total of $650 million in Title I payments and $3 billion in Title II requirements payments to be distributed over the next three years. More than half of the funding was to be distributed in FY 2003. While less than one-third of that sum was actually appropriated for FY 2003, Congress made up the difference in funding and provided full funding in FY 04. To date, FY 2005 funding is unknown, and the President is only recommending $40 million for FY 05, rather than the $600 million that is authorized by HAVA. Based on the foregoing, the State has created its HAVA budget assuming the following levels of funding:

Federal Fiscal Year	Federal Appropriations	Nevada's Share	5% Match
Title I Early Payments	$650 million	$5 million	n/a
2003	$833 million	$5.7 million	$304,313
2004	$1.5 billion	$10.3 million	$546,062
2005	$40 million	$265,000	$15,000
2006	$0	$0	$0
Total	$3.02 billion	$21.2 million	$865,375

Because the actual level of funding that will be authorized through FY year 2005-2006 is currently unknown, the State's proposed HAVA budget will be revised over time as actual federal funding becomes known. The State's budget through FY 2006 follows, based on our best estimates of the costs of such activities and the amount of funding as discussed herein:

Title III Requirements:

Voting System Purchases/Upgrades:

--Develop strategies to obtain funding, to the extent available, to provide additional touch screen systems for Clark County that are fitted with voter verifiable paper audit trail printers.

--To be funded with Title I early payments, Title II requirements payments and State matching funds.

Establishing and Maintaining a Statewide Voter Registration List:

--$4 to $5 million base cost, plus ongoing maintenance costs of approximately $100,000 per year.

--To be funded with Title I early payments, Title II requirements payments and State matching funds.

Provisional Voting and Voting Information Requirements:

--$150,000 to create and develop enhancements to the free-access system, provide necessary training and outreach, and develop voting information.

--To be funded with Title II requirements payments and State matching funds.

Other Activities:

Ongoing assessment of polling place accessibility and ADA compliance:

--Amount to be determined based upon adequate funding.

Voter education and outreach activities:

--$38,000 for *Easy Voter Project.*

--Additional funding to be determined based on adequate funding.

Election official and poll worker training initiatives:

--Amount to be determined based upon adequate funding.

Additional technology and elections personnel in the office of the Secretary of State:

--Amount to be determined based upon adequate funding.

G. Maintenance of Effort

Section 254(a)(7) requires a description of how the State, in using the requirements payment, will maintain the expenditures of the State for activities funded by the payment at a level that is not less than the level of such expenditures maintained by the state for the fiscal year ending prior to November 2000.

Consistent with the maintenance of effort requirement contained in HAVA, in using any requirements payments, the State will maintain expenditures of the State for activities funded by the payment at a level equal to or greater than the level of such expenditures maintained by the State for its fiscal year that ended prior to November 2000. The fiscal year that ended prior to November 2000 was FY year 2000, which began July 1, 1999, and ended on June 30, 2000. The total expenditures attributable to the Secretary of State's Elections Division for FY 2000 were $151,207. The total expenditures attributable to the Elections Division increased in the State's fiscal years 2001, 2002, 2003, 2004 and 2005 and are anticipated to increase in FY 06.

The Secretary of State's budget for FY 2005 for the Elections Division was approximately $410,000, and the proposed budget in FY 06 is approximately $299,000. The State Legislature has the ultimate power to approve these funding levels and has been apprised of the maintenance of effort requirements contained in HAVA. In the event the additional funding request is denied, the projected state funded expenses for FY 2006 will still exceed $250,000.

H. Performance Goals and Measures

Section 254(a)(8) requires a description of how the State will adopt performance goals and measures that will be used by the State to determine its success and the success of units of local government in the State in carrying out the plan, including timetables for meeting each of the elements of the plan, descriptions of the criteria the State will use to measure performance and the process used to develop such criteria, and a description of which official is to be held responsible for ensuring that each performance goal is met.

The Secretary of State, in collaboration with local election officials, will establish performance goals and will institute a process to measure progress toward achieving these goals. This process will provide local election officials with structure and continued measurable targets for accomplishment. In addition, each local election official will be required to report the progress of such local jurisdiction in meeting the performance goals and measures to the Secretary of State within 60 days following every general election held in the State.

Performance Goals

The State's primary goal is to achieve election reform and compliance with HAVA through the successful implementation of the programs outlined in the State Plan. Following is a description of the timetable for meeting each element of the Plan and the title of the official responsible for ensuring each such element is met:

Element	State/County Official	Timetable
Voting Systems	State Elections Deputy County Election Official	By September 2004
Voter Registration	State Elections Deputy County Election Official	By January 1, 2006
Provisional Voting	State Elections Deputy County Election Official	By January 1, 2004
Additional Personnel	State Elections Deputy	By January 1, 2006
Polling Place Accessibility	State Elections Deputy County Election Official	Ongoing
Voter Education/Outreach	State Elections Deputy County Election Official	Ongoing
Poll Worker Training	State Elections Deputy County Election Official	Ongoing
Complaint Procedures	Deputy Attorney General	Adopted/Ongoing

Performance Measures

The State will use the following criteria to measure performance:
--voter turnout statistics
--functionality of voting systems
--accuracy of the data contained in the statewide voter registration list
--voter satisfaction with equipment (accomplished through surveys or other strategies)
--complaints against poll workers
--complaints received versus complaints resolved
--ADA compliance

These criteria were developed through the State Planning Process.

I. State-Based Administrative Complaint Procedure

Section 254(a)(9) requires a description of the uniform, nondiscriminatory State-based administrative complaint procedures in effect under section 402. This state-based administrative complaint procedure must be in effect prior to certification of the State Plan, but no later than January 1, 2004; no waiver of the procedure is permitted.

The Advisory Committee has developed and adopted a procedure for complaints that meets HAVA requirements[7]. The Secretary of State adopted regulations to place these procedures into the State Administrative Code prior to submission of the FY 03-04 State Plan.

In summary, the procedure provides a uniform, nondiscriminatory procedure for the resolution of any complaint alleging a violation of any provision of Title III of HAVA, including a violation that has occurred, is occurring, or is anticipated to occur. Any person who believes a violation of any provision of Title II has occurred may file a complaint with the Secretary of State. The complaint must be written, signed, sworn to and notarized. At the request of the complainant, the Secretary of State will conduct a hearing on the record that will be conducted in accordance with HAVA requirements. The Secretary of State will provide the appropriate remedy and will provide a final determination within the timeframes specified in HAVA. The procedure provides for alternative dispute resolution if the Secretary of State does not make a timely final determination. Finally, the procedure requires the Secretary of State to make reasonable accommodations to assist persons in need of special assistance for utilizing the complaint procedure.

[7] See Appendix A for copy of Administrative Complaint Procedure.

J. Effect of Title I Payments

If the State received payment under Title I, Section 254(a)(10) requires a description of how such payment will affect the activities proposed by the State to be carried out under the plan, including the amount of funds available for such activities.

On April 30, 2003, the State received $5 million in Title I payments. The State has expended a portion of these funds for the voting system upgrades described in this State Plan. In addition, the State has expended these funds for ancillary devices, equipment and services associated with the voting systems contract and for travel and training activities necessary for implementing the new voting systems and the statewide voter registration system. Finally, the State has contracted to expend a portion of these funds for voter outreach activities, including involvement in the *Easy Voter Project* described in this Plan. The effect this funding will have on the activities proposed by the State in this Plan has been previously discussed throughout this Plan. Section 6 of this Plan specifically sets forth the State's intended additional uses for these funds.

K. Ongoing Management of the State Plan

Section 254(a)(11) requires a description of how the State will conduct ongoing management of the plan, except that the State may not make any material change in the administration of the plan unless the change—

(A) is developed and published in the Federal Register in accordance with section 255 in the same manner as the State plan;

(B) is subject to public notice and comment in accordance with section 256 in the same manner as the State plan; and

(C) takes effect only after the expiration of the 30-day period which begins on the date the change is published in the Federal Register in accordance with subparagraph (A).

The State intends to use the State Plan as the foundation for its goals in achieving election reform and compliance with HAVA. To achieve these goals, the Secretary of State will appoint an internal committee in his office to be overseen by the Deputy Secretary for Elections. This committee will be responsible for conducting ongoing management of the State Plan. To carry out this function, the committee will be required to hold meetings as deemed necessary to address HAVA related issues and keep current on the State's progress toward implementation of HAVA. The Deputy Secretary for Elections, or a designee, will be required to report to the State Advisory Committee the activities involved with the ongoing management of the Plan. The Secretary of State will hold an annual meeting of the State Advisory Committee to review and update the State Plan, as necessary. The Secretary of State may also convene the State Advisory Committee at other times during the year as deemed advisable.

L. Changes to the State Plan from the Previous Fiscal Year

In the case of a State with a State plan in effect under this subtitle during the previous fiscal year, Section 254(a)(12) requires a description of how the plan reflects changes from the State plan for the previous fiscal year and of how the State succeeded in carrying out the State plan for such previous fiscal year.

Due to the delayed formation of the EAC, the State's FY 03-04 State Plan's publication in the *Federal Register* was not completed until May 2004. Because of this holdup in publication, the State did not fully implement all of its FY 2003-04 plan in that plan year and continued to progress toward implementation through the FY 2004-05 and current plan year. This FY 2005-06 State Plan incorporates the same basic theme as the FY 03-04 and the FY 04-05 plans, and generally reports upon the procedures implemented by the State in carrying out the previous plan, such as upgrades to voting systems throughout the State and specific voter education and outreach efforts undertaken by the State. The other key changes between the last plan and this plan center around federal and state funding changes, progress on implementation activities and development of new projects, and maintenance of efforts updates.

M. Committee Description and Development of State Plan

Section 254(a)(13) requires a description of the committee which participated in the development of the State plan in accordance with section 255 and the procedures followed by the committee under such section and section 256.

The State's Advisory Committee consists of fourteen (14) members including the Secretary of State, local election officials from the two largest counties in the State and a variety of other election stakeholders[8]. The Secretary of State selected the committee membership and either he or his Chief Deputy acted as Chairman for each meeting held.

Members of the State Advisory Committee and their qualifications are as follows:

John Bliss, Esq., Privacy Strategist, IBM (Appointee of Senate Majority Leader William Raggio)
LaVonne Brooks, Executive Director, High Sierra Industries
Dan Burk, Washoe County Registrar of Voters
Jan Gilbert, Northern Nevada Coordinator for Progressive Leadership Alliance of Nevada (PLAN)
Dean Heller, Secretary of State
Joshua Hicks, Esq., Senior Deputy Attorney General (Appointee of Attorney General Brian Sandoval)
Linda Law, Policy Analyst & Legislative Liaison for the Governor (Appointee of Governor Kenny Guinn)
Larry Lomax, Clark County Registrar of Voters
Renee L. Parker, Esq., Chief Deputy Secretary of State
Barbara Reed, Douglas County Clerk
Tony F. Sanchez, III, Esq., President, Latin Chamber of Commerce; Partner, Jones Vargas Law Firm

[8] See Appendix B for Advisory Committee biographies and party affiliations.

Dr. Richard Siegel, President, ACLU of Nevada
Monica Simmons, Henderson City Clerk
Scott Wasserman, Esq., Chief Deputy Legislative Counsel (Appointee of Assembly Speaker Richard Perkins)

Advisory Committee Staff in the Office of the Secretary of State and their qualifications are as follows:

Ellick C. Hsu, Esq., Deputy Secretary of State for Elections
Ronda L. Moore, Esq., State HAVA Coordinator
Lin Nary, Committee Secretary, Administrative Assistant

To develop this FY 05-06 State Plan, the State Advisory Committee members, with the assistance of Staff, individually proposed revisions necessary to update the plan to reflect current circumstances and met on July 19, 2005 to review the draft incorporating the proposed revisions, to consider comments submitted by the public, and to formally adopt the final plan.[9] Committee meetings were publicly held and noticed in accordance with Nevada's Open Meeting Law.[10]

The FY 05-06 State Plan was made available for public inspection and comment for a 31-day period prior to submission of the plan to the Committee. The Secretary of State published the draft plan and notice of the comment period on June 17, 2005, in his offices, on his website, in the Nevada State Library, at all main county libraries throughout the State, all city and county clerks' offices throughout the State, and at various other public agencies throughout the State. The notice made it clear that the Secretary of State would accept public comment in the form of e-mails, letters, faxes, etc. until July 18, 2005. However, no public input was received during the comment period. Accordingly, the Committee adopted the final version of the draft plan at its meeting on July 19, 2005.

[9] See Appendix C for corresponding meeting agenda.
[10] Chapter 241 of the Nevada Revised Statutes.

APPENDIX A
Administrative Complaint Procedure
NAC 293.500 – 293.560, inclusive

COMPLAINTS ALLEGING VIOLATION OF TITLE III OF HELP AMERICA VOTE ACT OF 2002

NAC 293.500 Definitions. (NRS 293.124, 293.4685) As used in NAC 293.500 to 293.560, inclusive, unless the context otherwise requires, the words and terms defined in NAC 293.505 and 293.510 have the meanings ascribed to them in those sections.
(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.505 "Complainant" defined. (NRS 293.124, 293.4685) "Complainant" means a person who files a complaint with the Secretary of State pursuant to NAC 293.515.
(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.510 "Respondent" defined. (NRS 293.124, 293.4685) "Respondent" means a state or local election official against whom a complaint is filed pursuant to NAC 293.515.
(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.515 Filing; form; delivery of copy to respondents. (NRS 293.124, 293.4685)
1. A person who believes that a violation of Title III of the Help America Vote Act of 2002, Public Law 107-252, 42 U.S.C. §§ 15481 to 15502, inclusive, has occurred, is occurring or is about to occur may file a complaint with the Office of the Secretary of State.
2. A complaint filed pursuant to subsection 1 must:
(a) Be in writing, notarized and signed and sworn by the complainant. If the Secretary of State prescribes a form for the complaint, the complaint must be filed on that form.
(b) Provide the name of each respondent and a concise statement of the facts of the alleged violation of 42 U.S.C. §§ 15481 to 15502, inclusive.
(c) Be filed in the Office of the Secretary of State in Carson City:
(1) Not later than 60 days after the occurrence of the action or event that forms the basis for the complaint or for the belief of the complainant that a violation of 42 U.S.C. §§ 15481 to 15502, inclusive, is about to occur; or
(2) Not later than 60 days after the complainant knew or, with the exercise of reasonable diligence, should have known of the action or event that forms the basis for the complaint or for the belief of the complainant that a violation of 42 U.S.C. §§ 15481 to 15502, inclusive, is about to occur,
↪ whichever is later.
3. The complainant shall mail or deliver a copy of the complaint to each respondent not later than the date on which the complaint is filed.
(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.520 Review; dismissal and refiling. (NRS 293.124, 293.4685)
1. The Secretary of State or his designee will review each complaint filed pursuant to NAC 293.515 to determine whether the complaint:
(a) States a violation of 42 U.S.C. §§ 15481 to 15502, inclusive; and

(b) Complies with the requirements of NAC 293.515.

2. If a complaint fails to state a violation of 42 U.S.C. §§ 15481 to 15502, inclusive, or does not comply with the requirements of NAC 293.515, the complaint will be dismissed without further action and notice of the dismissal will be provided to the complainant.

3. Except as otherwise provided in subsection 4, a complainant whose complaint has been dismissed pursuant to this section may refile the complaint within the time set forth in paragraph (c) of subsection 2 of NAC 293.515.

4. A complainant whose complaint has been dismissed for failure to state a violation of 42 U.S.C. §§ 15481 to 15502, inclusive, may refile the complaint only one time.

(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.525 Consolidation; official record. (NRS 293.124, 293.4685)

1. The Secretary of State may consolidate complaints filed pursuant to NAC 293.515 if the complaints relate to the same action or event or raise a common question of law or fact. The Secretary of State will notify all interested parties if two or more complaints have been consolidated.

2. The Secretary of State will compile and maintain an official record in connection with each complaint filed pursuant to NAC 293.515.

(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.530 Hearing: Request; date; notice; nature. (NRS 293.124, 293.4685)

1. A complainant may request in a complaint filed pursuant to NAC 293.515 that the Secretary of State hold a hearing on the complaint.

2. If a complainant requests a hearing in accordance with subsection 1, the Secretary of State or his designee will conduct a hearing on the complaint, unless the complaint is dismissed pursuant to NAC 293.520. The hearing will be held not sooner than 10 days but not later than 30 days after a request for a hearing has been made in accordance with subsection 1.

3. The Secretary of State will provide notice of the date, time and place of the hearing at least 10 business days before the hearing:

(a) By mailing a copy of the notice to the complainant, each respondent and any interested person who has requested in writing to be advised of the hearing;

(b) By posting a copy of the notice in a prominent place at the Office of the Secretary of State that is available to the general public; and

(c) By posting a copy of the notice on the website of the Secretary of State.

4. A hearing held pursuant to this section is not a contested case for the purposes of chapter 233B of NRS.

(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.535 Hearing: Hearing officer; procedure. (NRS 293.124, 293.4685)

1. Except as otherwise provided in this subsection, the Secretary of State or his designee will act as the hearing officer for a hearing held pursuant to NAC 293.530. If the Secretary of State is a respondent in the complaint, the Secretary of State will appoint a designee who is an independent professionally qualified person to act as the hearing officer.

APPENDIX A
Administrative Complaint Procedure
NAC 293.500 – 293.560, inclusive

2. The complainant, any respondent and any interested member of the public may appear at the hearing, in person or by teleconference, and testify or present relevant evidence in connection with the complaint. All testimony to be considered in the hearing will be taken under oath. The hearing officer may limit the testimony of witnesses, if necessary, to ensure that all interested persons may present their views. The hearing officer may recess the hearing and reconvene the hearing at a later date, time and place, which must be announced publicly at the hearing.

3. A complainant, respondent or other person who testifies or presents evidence at the hearing may, but need not, be represented by an attorney.

4. Cross-examination at the hearing will be permitted only at the discretion of the hearing officer, but a person may testify or present evidence at the hearing to contradict any other testimony or evidence presented at the hearing. If a person has already testified or presented evidence at the hearing and wishes to contradict testimony or evidence presented subsequently, that person is entitled to be heard again only at the discretion of the hearing officer, who may authorize the person to provide an oral or written response, or both.

5. The hearing will be recorded on audiotape by and at the expense of the Office of the Secretary of State. The recording will not be transcribed, but the Secretary of State, a local board of elections or any party to the hearing may obtain a transcript of the hearing at its own expense. If a board or party obtains a transcript of a hearing, the board or party shall file a copy of the transcript as part of the record and any other interested party may examine the copy of the transcript on record.

6. Any party to the proceeding may file a written brief or memorandum with the hearing officer not later than 5 business days after the conclusion of the hearing. The party shall serve a copy of any such written brief or memorandum on all other parties not later than the time the written brief or memorandum is filed with the hearing officer. No responsive or reply memorandum to such a brief or memorandum will be accepted without the specific authorization of the hearing officer.

7. At the conclusion of the hearing and after any brief or memorandum has been filed pursuant to subsection 6, the hearing officer will determine whether, by a preponderance of the evidence, a violation of 42 U.S.C. §§ 15481 to 15502, inclusive, has occurred, is occurring or is about to occur.

(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.540 Review and determination when no hearing requested. (NRS 293.124, 293.4685) If a complainant has not requested a hearing on a complaint filed pursuant to NAC 293.515, the Secretary of State or his designee will review the complaint and any accompanying record and determine whether, by a preponderance of the evidence, a violation of 42 U.S.C. §§ 15481 to 15502, inclusive, has occurred, is occurring or is about to occur. If the Secretary of State is a respondent in the complaint, the Secretary of State will appoint an independent professionally qualified person to act as his designee pursuant to this section.

(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.545 Remedial action or dismissal; issuance of final determination. (NRS 293.124, 293.4685)

1. If the Secretary of State or his designee, whether acting as a hearing officer pursuant to NAC 293.535 or reviewing a complaint pursuant to NAC 293.540, determines that a violation of 42 U.S.C. §§ 15481 to 15502, inclusive, has occurred, is occurring or is about to occur, the Secretary of State or his designee will provide the appropriate remedy, including, without limitation, an order to a respondent commanding the respondent to take specified action or prohibiting the respondent from taking specified action, with respect to a past or future election. Such a remedy will not include an award of money damages or attorney's fees.

2. If the Secretary of State or his designee, whether acting as a hearing officer pursuant to NAC 293.535 or reviewing a complaint pursuant to NAC 293.540, determines that a violation of 42 U.S.C. §§ 15481 to 15502, inclusive, has not occurred, is not occurring or is not about to occur, the Secretary of State or his designee will dismiss the complaint.

3. The Secretary of State or his designee will issue a final determination on a complaint made pursuant to subsection 1 or 2 in writing. The final determination will include an explanation of the reasons for the determination and, if applicable, the remedy selected.

4. Except as otherwise provided in NAC 293.550, a final determination of the Secretary of State or his designee on a complaint will be issued within 90 days after the complaint is filed, unless the complainant consents in writing to an extension. The final determination will be:

(a) Mailed to the complainant, each respondent and any interested person who has requested in writing to be advised of the final determination;

(b) Posted on the website of the Secretary of State; and

(c) Made available by the Secretary of State, upon request, to any interested person.

(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.550 Proceedings for alternative dispute resolution. (NRS 293.124, 293.4685)

1. If the Secretary of State or his designee does not render a final determination on a complaint filed pursuant to NAC 293.515 within 90 days after the complaint is filed, or within any extension period to which the complainant has consented, the Secretary of State will, on or before the fifth business day after the final determination was due to be issued, initiate proceedings for alternative dispute resolution by:

(a) Retaining an independent, professionally qualified person to act as an arbitrator, if the complainant consents in writing to his appointment as the arbitrator at the time of his appointment; or

(b) Designating in writing to the complainant the name of an arbitrator to serve on an arbitration panel to resolve the complaint. If proceedings for alternative dispute resolution are initiated pursuant to this paragraph, not later than 3 business days after the complainant receives such a designation from the Secretary of State, the complainant shall designate in writing to the Secretary of State the name of a second arbitrator. Not later than 3 business days after such a designation by the complainant, the two arbitrators so designated shall select a third arbitrator to complete the panel.

2. The arbitrator or arbitration panel may review the record compiled in connection with the complaint, including, without limitation, the audio recording of the hearing, any transcript of the hearing and any briefs or memoranda submitted by the parties but shall not receive any additional testimony or evidence unless the arbitrator or arbitration panel requests that the parties present additional briefs or memoranda.

3. The arbitrator, or arbitration panel by a majority vote, shall determine the appropriate resolution of the complaint.

4. The arbitrator or arbitration panel shall issue a written resolution of the complaint not later than 60 days after the final determination of the Secretary of State was due pursuant to NAC 293.545. This period for issuing a written resolution will not be extended.

5. The final resolution of the arbitrator or arbitration panel will be:

(a) Mailed to the complainant, each respondent and any other person who requested in writing to be advised of the final resolution;

(b) Posted on the website of the Secretary of State; and

(c) Made available by the Secretary of State, upon request, to any interested person.

(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.555 Final determination or resolution not subject to appeal. (NRS 293.124, 293.4685) A final determination of the Secretary of State or his designee pursuant to NAC 293.535, 293.540 or 293.545 or the final resolution of an arbitrator or arbitration panel pursuant to NAC 293.550 is not subject to appeal in any state or federal court.

(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.560 Assistance in using procedures. (NRS 293.124, 293.4685) The Secretary of State will make reasonable accommodations to assist persons in using the procedures set forth in NAC 293.500 to 293.560, inclusive.

(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

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NAC 293.500 – 293.560, inclusive

APPENDIX B
Advisory Committee Biographies and Party Affiliations

NAME	TITLE - ORGANIZATION	PARTY AFFILIATION	BIOGRAPHY
Brooks, LaVonne	Executive Director, High Sierra Industries (HSI)	Democrat	Bachelor and Master in Organizational Management and Development. First Hispanic Female appointed to serve as a City of Reno Planning Commissioner and appointed to serve as Vice Chair on the Governor's Task Force for Provider Rates in 2001 & 2002. Prior to joining HSI, LaVonne worked for an international consulting firm for 2 years and spent 14 years with a computer manufacturing company. She then owned her own training & development company specializing in improving performance through computer upgrades.
Burk, Dan	Registrar of Voters, Washoe County	Nonpartisan	B.A. in Public Administration, U of North Texas (1970). M.A. in History, U of Northern Colorado (1977). Dan has worked for over 25 years in all aspects of election procedures. Currently the Washoe County Registrar of Voters (since 1998), Dan previously served in many election positions in Oregon, where he was the Director of Records and Elections in Benton County for 18 years and conducted Oregon's first vote-by-mail election in 1980. He also served as the Local Government Liaison Officer for the Oregon Secretary of State's Office, and was a member of Oregon State's Committee for the Implementation of the American Disabilities Act regarding Oregon's standards for handicapped access to polling locations. In 2002, Dan earned the prestigious designation of Certified Election and Registration Administrator (CERA Certification) from the National Elections Center and Auburn University, the first election official in Nevada to have been so honored.
Gilbert, Jan	Northern Nevada Coordinator PLAN	Democrat	B.A. Economics from UCLA. She co-founded the Progressive Leadership Alliance of Nevada (PLAN) and the Nevada Empowered Women's Project, a non-profit organization representing low-income women. Prior to working on economic and environmental justice issues at the state legislature for 19 years, she began advocacy work for the League of Women Voters. She has received several Humanitarian Awards including the Women's role Model Award from the Attorney General and the Hannah Humanitarian Award from the Committee to Aid Abused Women. She also served on the Department of Human Resources Block Grant Commission for 7 years and was Chairman for two of those years.
Guinn, Kenny C.	Governor	Republican	Undergraduate degree in Physical Education from Fresno State, University, doctorate in Education from Utah State University. In 1964 he began working for the Clark County School District as a planning specialist and shortly was named Superintendent of Schools for Clark County. He served as Superintendent until 1978 and then began applying his management skills in business for Nevada Savings and Loan in Las Vegas which later became PriMerit Bank. He soon was appointed Chairman of the Board of Directors of the Las Vegas-based bank and was also recruited to the energy business as the President of Southwest Gas Corporation becoming the Chairman of the Board of Directors of that utility in 1993. In 1994, Guinn was recruited by the University of Nevada Board of Regents to serve as interim president of the University of Nevada-Las Vegas. In addition to his one-year term at UNLV, Guinn served the state in leadership roles on several committees. He was elected Governor of Nevada in 1998.
Appointment: Linda Law	Policy Analyst and Legislative Liaison to Governor Guinn		Degree in Business and Finance from WNCC and has completed additional courses in Accounting, Statistics and Computer applications. Linda has been involved with the Nevada State Legislature since 1977, serving as a member of the legislative staff for three years and on the staff in the Research Division of the Legislative Counsel Bureau for seven years, as well as lobbying on various issues during three sessions, and has worked as Legislative Liaison for Governor Guinn's office since February of 2000. Previously, Linda owned a computer and consulting business for 10 years and was a licensed real estate professional. She was an Officer and Member of the founding board of the Boys and Girls Club of Western Nevada, and holds a current private pilot license.
Heller, Dean	Secretary of State	Republican	B.A. in Business Administration, specializing in finance and securities analysis from USC in 1985. Assemblyman in the Nevada Legislature from 1990-1994. First elected Secretary of State in 1994 and re-elected in 1998 and 2002. He serves on several boards including the Board of Examiners, State Prison Board, and the Tahoe Regional Planning Agency. Additionally, he holds the position of Western Region Vice President on the National Association of Secretaries of State (NASS) and is the Chair of NASS' Securities Committee.
Renee Parker	Chief Deputy Secretary of State	Nonpartisan	Renee Parker, Esq. has been the Chief Deputy for Secretary of State Dean Heller since December 2000. The previous three years, she served as Assistant General Counsel to the Public Utilities Commission of Nevada. In 1997, Ms. Parker returned to Carson City after practicing Corporate and Securities Law with the law firm of Pillsbury, Madison and Sutro in the San Francisco Bay Area. She received both her B.S. in Economics (magna cum laude) and her J.D. (summa cum laude) from Santa Clara University in Santa Clara, California.

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APPENDIX B
Advisory Committee Biographies and Party Affiliations

NAME	TITLE - ORGANIZATION	PARTY AFFILIATION	BIOGRAPHY
Lomax, Larry	Registrar of Voters, Clark County	Nonpartisan	B.A. in English Literature, Stanford University (1967) and Master of Business Administration from University of North Dakota (1977). He was a Distinguished Graduate from the Air Force's Officer Training School and as a pilot flew over 4,000 hours in a 30 year career. He served on the Joint Staff in Washington D.C. and had the opportunity to work with legislators and staff members on a wide range of issues. He began his career as Assistant Registrar for Registrations in January of 1998 overseeing the training of 7,000 election board officers, processing of petitions, and election night logistics and was appointed Registrar of Voters with full responsibility for the County's Election Department in March of 1999.
Perkins, Richard	Assembly Speaker	Democrat	B.A. in Criminal Justice and a B.A. in Political Science from the University of Nevada, Las Vegas. He currently serves as Deputy Police Chief of the City of Henderson. Mr. Perkins was first elected to the Nevada Assembly in 1993, serving as a member of the Interim Finance Committee (1993-1994 & 1997-2004), the Democratic Floor Leader (1995), the Majority Floor Leader (1997-1999) and as Speaker of the Assembly from 2001 through 2005. He was also Chairman of the Legislative Commission (1997-1999 & 2001-2003), Chairman of the Commerce Committee (1997-1998), Chairman of the Growth and Infrastructure Committee (2005 to present), and Chairman (2003-2005) and Member (1997-1998) of the Legislative Oversight Committee on Education.
Appointment: Scott Wasserman	Chief Deputy Legislative Counsel	Nonpartisan	B.A. University of Connecticut (1981) and J.D. Univ. of Pacific, McGeorge School of Law (1985). Scott is the Chief Deputy Legislative Counsel for the Nevada Legislature. He previously served as Counsel to the Senate Committee on Government Affairs, which has jurisdiction over election laws in the Nevada Senate, and to the Assembly Committee on Elections, Procedures and Ethics. In the 2005 Session, Scott served as Assembly Bill Drafting Advisor. Scott has also served as the Legal Advisor to the Legislative Committees having jurisdiction over Reapportionment matters since 1987.
Raggio, William	Senator	Republican	Louisiana Tech; University of Oklahoma; University of Nevada, Reno, B.A.; University of California, Hastings College of Law, J.D.; University of California, Berkeley, Boalt Hall School of Law. Senator. Attorney at Law.
Appointment: John Bliss	Privacy Strategist, IBM	Appointee:	B.A. in History from UC San Diego (1980). J.D., Georgetown Univ. Law Ctr (1985). Attorney in private practice, Washington, D.C. (1985-1991). Chief Counsel, Sen. Hank Brown (R-CO) (1991-1994). Minority Chief Counsel, Subcomms. on the Constitution, Technology and the Law, Juvenile Justice, U.S. Senate Judiciary Committee (1991-1994). Lobbyist/Consultant, Washington, D.C. (1995-2002). (Chief Privacy Officer, Systems Research & Development, Las Vegas, NV (2002-2005). Privacy Strategist, Entity Analytic Solutions, IBM, Las Vegas, NV (Jan. 2005-Present).
Reed, Barbara	County Clerk, Douglas County	Republican	Barbara has worked in elections for over thirty years, serving in the Douglas County Clerk-Treasurer's office since November of 1973 and first elected Clerk-Treasurer in 1986. Her key interest and commitment is the election process and the advancements currently being taken to allow voters easy accessibility to vote. Barbara has been an active Member of the Nevada Association of County Clerks and Local Election Officials (NACCEO) since it was formed in 1999, serving as the founding President of the organization (1999-2000) and as Member or President of its Legislative Committee since 1999. She is also active in the County Fiscal Officers Association for the State of Nevada (CFOA) and served as a past President (1997-1998), as well as a Member or President of its Legislative Committee since 1988. Barbara attended the National Institute for Public Finance Executive Program at the Northwestern University Kellogg Graduate School of Management (1999), and is a graduate of the Silver State Excellence in Public Service series (2004). Interrupting her college career to raise her two children, Barbara intends to complete the year or so of courses she needs to earn her degree sometime in the fut
Sanchez, Tony F. II	Attorney, Jones Vargas	Democrat	B.A. UNLV (1988), Arizona State University College of Law (J.D. 1991). Served as Assistant Legislative Counsel to U.S. Senator Richard H. Bryan 1(1992-1995), Assistant General Counsel for the NV Public Utilities Commission (1995-1998) and Executive Assistant to Governor Bob Miller (1998-1999). President, Latin Chamber of Commerce 2002 and 2003; Trustee, Las Vegas Chamber of Commerce (2001-2004). Vice President, Latino Bar Association 2000-2001 and Board Member 2002 to present. Partner, Jones Vargas Law Firm with emphasis in Legislative and Government Relations, Energy and Utility Law, Zoning and Land Use, and Ballot Initiative and Election Law.

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APPENDIX B
Advisory Committee Biographies and Party Affiliations

NAME	TITLE, ORGANIZATION	PARTY AFFILIATION	BIOGRAPHY
Sandoval, Brian	Attorney General	Republican	A graduate of the University of Nevada and the Ohio State University College of Law. He served two terms in the Nevada Legislature before receiving an appointment to the Nevada Gaming Commission in 1998. One year later, he was named by Governor Guinn as Chairman of the Commission and at age 35, he was the youngest person in Nevada history to serve in that capacity. Sandoval also spent three years as the Nevada at-large member of the Tahoe Regional Planning Agency Governing Board. He is a member of the Nevada State Boards of Pardons, Prisons, Examiners, Transportation, domestic Violence and Private Investigators and the Boards of Trustees for Children's Cabinet of Reno, KNPB channel 5, St. Jude's Ranch and the Washoe County, Nevada Law Library. As Attorney General, he leads a staff of 350, including 140 lawyers, and administers a budget of $42 million. Sworn in as Nevada's Attorney General on January 6, 2003.
Appointment: Joshua Hicks	Senior Deputy Attorney General		B.A. in History (1995) and J.D. (1998), both from Santa Clara University in Santa Clara, California. Josh served as a law clerk to the Nevada Supreme Court in 1999 and to the United States District Court for the District of Nevada in 2000. With the Nevada Attorney General's Office since 2002, Josh formerly served as counsel to the Nevada Tax Commission and the Nevada Department of Taxation. He has served as counsel to the Nevada Secretary of State since 2004.
Siegel, Dr. Richard	President, ACLU of Nevada	Democrat	Professor and Political Scientist at the University of Nevada, Reno from 1965 through January of 2005. Dr. Siegel is currently Professor Emeritus of Political Science at UNR. His academic specialties are foreign policy and international human rights. He served on the National Board of Directors of the American Civil Liberties Union from 1975-1988 and currently is President of the ACLU of Nevada. He is also active with the Nevada Faculty Alliance, the Nevada Committee on Foreign Relations, and the Progressive Leadership Alliance of Nevada.
Simmons, Monica	City Clerk, City of Henderson	Nonpartisan	Appointed City Clerk for the City of Henderson in 1998, her responsibilities include administration of municipal elections. Monica began her tenure with the City of Henderson City Attorney's Office in 1979 serving through her appointment as City Clerk. Having completed Seattle University's Northwest Academy in 2002, she was accepted into the post-certification Master Municipal Clerk Academy. She received her business accreditation from Southern Utah University in 1977 and is currently completing a degree in Public Administration. She serves as a member of the Clark County Election Department Accuracy & Certification Board and Early Voting Board. Monica is President of the Nevada Municipal Clerks Association and chairs the City of Henderson Latino Advisory Board. She remains active in the Election Center, Nevada Womens' History Project, IIMC, Nevada Municipal Clerks Association, and League of Cities. She maintains her legal administrator accreditation and associate membership with the American Bar Association.

ATTACHMENT C
Agenda for July 19, 2005 Advisory Committee Meeting

AGENDA

HELP AMERICA VOTE ACT
Advisory Committee

Tuesday, July 19, 2005, at 10:30 a.m.
Legislative Building (via video-conference)
401 South Carson Street
Carson City, NV
Room 2134

Grant Sawyer Building
555 East Washington Street
Las Vegas, NV
Room 4406

I. Introduction and Welcome
Dean Heller, Secretary of State
Renee Parker, Chief Deputy Secretary of State

II. Update on Status of HAVA Compliance and State/ Federal Funding Issues
A. Committee Discussion

III. Review and Approve Proposed HAVA State Plan as Revised for FY 05
A. Committee Discussion/Proposed Amendments
B. Committee Recommendation re: revisions to FY 05 HAVA State Plan
Action to be taken.

IV. Comments of Committee Members

V. Public Comment

VI. Adjournment

Notice of this meeting has been posted at the following locations:
The Capitol Building, 101 North Carson Street, Carson City, NV
Grant Sawyer State Office Building, 555 East Washington Street, Las Vegas, NV
The State Legislative Building, 401 South Carson Street, Carson City, NV
The State Library and Archives, 100 North Stewart Street, Carson City, NV

Notice of this meeting was posted on the following website: http://secretaryofstate.biz

We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the meeting. Please notify the Election's Division at the Secretary of State's office by calling (775) 684-5705.

State of South Carolina

Election Commission

PHONE: (803) 734-9060
FAX: (803) 734-9366
www.state.sc.us/scsec

August 9, 2005

Ms. Peggy Sims, Research Specialist
U.S. Election Assistance Commission
1225 New York Ave, NW – Ste 1100
Washington, DC 20005

Dear Ms. Sims,

As required by section 255 of the Help America Vote Act of 2002 (HAVA), I am pleased to file this letter and the following excerpts containing substantive changes in the 2005 South Carolina State Plan for publication in the Federal Register:

Executive Summary	page 5
Sections 1.2 through 1.5	pages 11-29
Section 6	pages 38-39
Section 12	pages 47-50

These pages, along with non-substantive changes made, will constitute the 2005 South Carolina State Plan. The complete State Plan may be accessed at http://www.state.sc.us/scsec/hava.htm .

Sincerely,

Marci Andino

Marci Andino
Executive Director

2221 Devine Street • Post Office Box 5987 • Columbia, South Carolina 29250

Executive Summary by the Executive Director

I am pleased to offer the South Carolina 2005 State Plan for implementing the Help America Vote Act of 2002 (HAVA). This State Plan, developed with the valuable help of the HAVA State Plan Task Force and updated each year by the HAVA State Plan Advisory Team, establishes a framework for achieving compliance with HAVA.

The federal law requires each state to develop a long-range State Plan for HAVA implementation and provides funding to assist the state in implementation. The South Carolina State Plan provides a description of current election procedures, outlines how South Carolina has met or will meet the new requirements mandated by HAVA, and outlines changes South Carolina has made since release of the initial State Plan to bring the State into compliance with HAVA. The State Plan will be updated and refined as necessary over time, to reflect election law changes and future plans.

The major change in the 2005 State Plan is a revised budget due to the failure of the federal government to appropriate funds for the third and final year of HAVA implementation. Despite an estimated $8 million shortfall, South Carolina will be in full compliance with HAVA as scheduled.

The State Plan reflects strategic objectives of great importance to every voter in South Carolina: implementation of a statewide uniform electronic voting system, support for disabled voters in every precinct in the State, enhancements to election administration, and training for voters, poll workers, and election officials. Building on current capabilities, the goal is to offer a higher level of service with increased ease of use, convenience, and consistency in every precinct across the State.

The South Carolina State Plan will be accomplished by January 2006, utilizing State and Federal funding. It will draw on the combined efforts of state and county organizations and affect every voter in South Carolina. The long-term impact of HAVA will be felt throughout the State for many elections to come.

The State Election Commission (SEC) recognizes the value of HAVA to South Carolina and is committed to successful implementation of all elements of the State Plan. With this State Plan, the SEC has taken an important step toward ensuring every citizen that every vote matters and every vote counts.

Marci Andino

Marci Andino
Executive Director
South Carolina State Election Commission

County	Voting System	Absentee System	# Machines	# Precincts	# Reg. Voters as of April 2003
Hampton	DRE	Optical Scan	36	19	14,027
Horry	DRE	Optical Scan	242	109	130,803
Jasper	DRE	Optical Scan	46	15	12,303
Kershaw	Punch Card	Punch Card	230	31	35,603
Lancaster	DRE	Unilect	130	28	34,486
Laurens	Optical Scan	Optical Scan	34	35	36,847
Lee	Optical Scan	Optical Scan	2	25	13,405
Lexington	Punch Card	Punch Card	800	69	137,923
Marion	DRE	Optical Scan	60	18	22,904
Marlboro	DRE	Optical Scan	41	16	18,971
McCormick	Optical Scan	Optical Scan	1	11	6,812
Newberry	DRE	Unilect	95	31	20,835
Oconee	Punch Card	Punch Card	200	30	39,240
Orangeburg	Optical Scan	Optical Scan	60	54	60,296
Pickens	DRE	Optical Scan	250	53	60,455
Richland	DRE	Optical Scan	765	111	200,855
Saluda	Optical Scan	Optical Scan	1	19	11,393
Spartanburg	DRE	Punch Card	245	88	147,860
Sumter	Punch Card	Punch Card	450	53	62,011
Union	Optical Scan	Optical Scan	1	28	10,272
Williamsburg	Optical Scan	Optical Scan	1	34	23,351
York	Punch Card	Punch Card	689	57	98,897

1.2 Voting System Options Considered

The Help America Vote Act of 2002 defines a voting system as follows:

1. "the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used (A) to define ballots; (B) to cast and count votes; (C) to report or display election results; and (D) to maintain and produce any audit trail information; and"

2. "the practices and associated documentation used – (A) to identify system components and versions of such components; (B) to test the system during its development and maintenance; (C) to maintain records of system errors and defects; (D) to determine specific system changes to be made to a system after the initial qualification of the system; and (E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots)."

In addressing the requirements of HAVA, the voting system standards team considered three options in order to meet the mandates. The three options were presented to the entire HAVA State Plan task force for consideration:

- Option 1: Upgrade existing systems to meet or exceed HAVA requirements

  As indicated above, the myriad systems currently in use in South Carolina create problems in the area of voter education, programming, candidate uniformity on ballots, election night reporting of results to the state, etc. This option would not solve the current shortcomings of the numerous systems.

- Option 2: Electronic voting systems in all counties

  This option would require each county to go to a federal and state approved DRE system of their choosing. Although this option would achieve the goals under the HAVA Act, the state would continue to have a variety in the types of equipment it uses.

- Option 3: Statewide uniform electronic voting system

  This option would provide a uniform system of voting for every county in the state. This option would standardize the election process including voter education in the state, poll worker training, uniformity of Federal and State offices in ballot and machine programming, etc.

Having considered the various options to comply with HAVA Title III requirements relating to voting system equipment and based on facts and the pros and cons of the three options, the entire task force decided on a statewide uniform electronic voting system to best meet the needs of HAVA and the State of South Carolina (Option 3).

The following approach was taken to select a statewide system:

- A consultant experienced in conducting needs assessments and writing Requests for Proposal (RFP) was contracted.

- A committee consisting of the State Election Commission, county election commissions and boards of registration, and other stakeholders such as organizations for the disabled, was assembled to work with consultant to determine the specifications for a statewide system.

- State procurement codes and bidding process was followed for the issuance of the RFP.

- An evaluation committee was assembled for meetings to evaluate vendor responses to the RFP. The membership of the committee will be made up of state and county election officials.

- After a protest and re-bid period, Election Systems & Software, iVotronic Voting system was chosen as the statewide uniform voting system for South Carolina.

1.3 Voting System Standards

Title III requirements for uniform and non-discriminatory election technology and administration are specified in HAVA section 301. The chart below takes each of the Voting Systems Standards and describes South Carolina's plan to meet the requirement.

Section 301: Voting System Standards	S.C. Status			Implementation
	Meets Requirement	Meets Requirement Partially	New Capability to be Implemented	
(a) REQUIREMENTS – Each voting system used in an election for Federal office shall meet the following requirements:				
(1) IN GENERAL –				
(A) Except as provided in subparagraph (B), the voting system (including any lever voting system, optical scanning voting system, or direct recording electronic system) shall –				
(i) permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;	Yes			The statewide voting system chosen for the State has a review screen for each voter to verify their selections before casting their ballot.
(ii) provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error), and	Yes			The statewide voting system chosen for the State allows each voter to make changes based on the information presented on a review screen.
(iii) if the voter selects votes for more than 1 candidate for a single office – (I) notify the voter that the voter has selected more than 1 candidate for a single office on the ballot; (II) notify the voter before the ballot is cast and counted of the effect of casting multiple votes for the office; and, (III) provide the voter with the opportunity to correct the ballot before the ballot is cast and counted.	Yes			The statewide voting system chosen for the State he system not allow a voter to choose more than one candidate for a single office.

Section 301: Voting System Standards	S.C. Status			Implementation
	Meets Requirement	Meets Requirement Partially	New Capability to be Implemented	
(B) A State or jurisdiction that uses a paper ballot voting system, a punch card voting system, or a central count voting system (including mail-in absentee ballots and mail-in ballots), may meet the requirements of subparagraph (A)(iii) by –				
(i) establishing a voter education program specific to that voting system that notifies each voter of the effect of casting multiple votes for an office; and	Yes			Specific instructions were produced for the statewide voting system currently used in the State. These instructions will be given to each voter in written form. In addition, absentee ballots will be accompanied by written instructions that address this requirement.
(ii) providing the voter with instructions on how to correct the ballot before it is cast and counted (including instructions on how to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error).	Yes			Specific instructions were produced for the statewide voting system currently used in the State. These instructions will be given to each voter in written form. In addition, absentee ballots will be accompanied by written instructions that address this requirement.
(C) The voting system shall ensure that any notification required under this paragraph preserves the privacy of the voter and the confidentiality of the ballot.	Yes			Instructions mentioned in B(ii) are posted inside the polling place and inside the voting booth.
(2) AUDIT CAPACITY –				
(A) IN GENERAL – The voting system shall produce a record with an audit capacity for such system.	Yes			The statewide voting system currently used in the State has the necessary audit capacity.
(B) MANUAL AUDIT CAPACITY –				
(i) The voting system shall produce a permanent paper record with a manual audit capacity for such system.	Yes			The statewide voting system currently used in the State produces an image of each vote cast; however, these votes will not be associated with any particular voter.

Section 301: Voting System Standards	S.C. Status			Implementation
	Meets Requirement	Meets Requirement Partially	New Capability to be Implemented	
(ii) The voting system shall provide the voter with an opportunity to change the ballot or correct any error before the permanent paper record is produced.	Yes			The statewide voting system currently used in the State provides the voter with a review screen and an opportunity to change the ballot or correct any error before the permanent paper record is produced.
(iii) The paper record produced under subparagraph (A) shall be available as an official record for any recount conducted with respect to any election in which the system is used.	Yes			County election officials are instructed to retain and secure the paper record in the event that a recount to be conducted with such record is ordered.
(3) ACCESSIBILITY FOR INDIVIDUALS WITH DISABILITIES – The voting system shall –				
(A) be accessible for individuals with disabilities, including non-visual accessibility for the blind and visually impaired, in manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters;	Yes			The statewide voting system currently used in the State is accessible to as many disabilities as possible, including the blind and visually impaired. Each county has one such unit in each precinct.
(B) satisfy the requirement of subparagraph (A) through the use of at least 1 direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place; and	Yes			Each polling place in the State has at least one disabled voting unit.
(C) if purchased with funds made available under Title II on or after January 1, 2007, meet the voting system standards for disability access				Does not apply at this time
(4) ALTERNATIVE LANGUAGE ACCESSIBILITY – The voting system shall provide alternative language accessibility pursuant to the requirements of section 203 of the Voting Rights Act of 1965 (42 U.S.C. 1973aa-1a).	Yes			South Carolina currently meets this requirement. While South Carolina is not required, based on the 2000 census and the Voting Rights Act of 1965, to provide alternative language to any jurisdiction in the State, the statewide voting system currently used in the State contains this feature.

Section 301: Voting System Standards	S.C. Status			Implementation
	Meets Requirement	Meets Requirement Partially	New Capability to be Implemented	
(5) Error Rates – The error rate of the voting system in counting ballots (determined by taking into account only those errors which are attributable to the voting system and not attributable to an act of the voter) shall comply with the error rate standards established under section 3.2.1 of the voting systems standards issued by the Federal Election Commission which are in effect on the date of the enactment of this Act.	Yes			The statewide voting system currently used in the State hass been State Certified which includes certification by an Independent Testing Authority (ITA) as having met or exceeded federal voting system standards as required by the S.C. 1976 Code of Laws.
(6) UNIFORM DEFINITION OF WHAT CONSTITUTES A VOTE – Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.	Yes			Final review is in process for the definition of a legal vote in a uniform manner for the statewide voting system. In addition, the State will define a legal vote as it pertains to absentee ballots.

1.4 Provisional Voting & Voting Information Requirements

The chart below takes each of the Provisional Voting and Voting Information requirements and describes South Carolina's plan to meet the requirement.

Section 302: Provisional Voting and Voting Information Requirements	S.C. Status			Implementation
	Meets Requirement	Meets Requirement Partially	New Capability to be Implemented	
(a) PROVISIONAL VOTING REQUIREMENTS – If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual shall be permitted to cast a provisional ballot as follows:				
(1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.	Yes			South Carolina currently meets this requirement. South Carolina legislation requires that voters who have moved and neglected to change their address will have the opportunity to vote using the Failsafe procedure. Also, legislation is in place to accommodate voters who are challenged.
(2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is (a) registered voter in the jurisdiction in which the individual desires to vote; and (b) eligible to vote in that election.	Yes			South Carolina currently meets this requirement. Each voter signs an oath with this language before receiving a ballot.
(3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).	Yes			South Carolina currently meets this requirement. The voter's ballot is placed in a provisional ballot envelope which contains various information about the voter.

Section 302: Provisional Voting and Voting Information Requirements	S.C. Status			Implementation
	Meets Requirement	Meets Requirement Partially	New Capability to be Implemented	
(4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.	Yes			South Carolina currently meets this requirement. Information contained on the provisional ballot envelope used by local election officials to determine the validity of the voter is reported at a certification hearing within three days after the election. If the vote is determined to be valid it is counted at the certification hearing.
(5) (A) At the time that an individual casts a provisional ballot, the appropriate State or local election official shall give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain under the system established under subparagraph (B) whether the vote was counted, and, if the vote was not counted, that reason that the vote was not counted.	Yes			When a voter casts a provisional ballot, that ballot will be placed in a provisional ballot envelope. Written instructions will be given to the voter on determining whether their vote was counted in the election.
(B) The appropriate State or local election official shall establish a free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted.	Yes			A website application allows the voter to determine whether their vote was counted or, if their vote was not counted, the reason it was not counted. A toll-free telephone number was installed at the State Election Commission for voters to call and determine if their vote was counted and, if their vote was not counted, the reason it was not counted. This number is 1-877-728-6846
(b) VOTING INFORMATION REQUIREMENTS –				
(1) PUBLIC POSTING ON ELECTION DAY – The appropriate State or local election official shall cause voting information to be publicly posted at each polling place on the day of each election for Federal office.				See (2) below for public posting of specific voting information.
(2) VOTING INFORMATION DEFINED – In this section, the term "voting information" means –				
(A) a sample version of the ballot that will be used for that election;	Yes			South Carolina currently meets this requirement. Poll managers at each polling place are required to display a sample ballot of each ballot in the respective election.
(B) information regarding the date of the election and the hours during which polling places will be open;	Yes			South Carolina currently meets this requirement. This information is currently listed on a Voter's Rights and Responsibilities poster which is displayed at each polling

Section 302: Provisional Voting and Voting Information Requirements	S.C. Status: Meets Requirement	Meets Requirement Partially	New Capability to be Implemented	Implementation
				location.
(C) instructions for how to vote, including how to cast a vote and how to cast a provisional ballot;	Yes			South Carolina meets this requirement. Instructions for all voting systems currently in use are provided at the polling locations. A poster of the *voter's bill of rights* is displayed. Provisional ballot instructions are included in this *bill of rights*.
(D) instructions for mail-in registrants and first-time voters under section 303(b);	Yes			South Carolina currently meets this requirement by providing written instructions to these voters.
(E) general information on voting rights under applicable Federal and State laws, including information on the right of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated; and	Yes			South Carolina currently meets this requirement by posting a Voter Rights and Responsibilities poster at every polling location.
(F) general information on Federal and State laws regarding prohibitions on acts of fraud and misrepresentation.	Yes			This information has been added to our current Voter Rights and Responsibilities poster.
(c) VOTERS WHO VOTE AFTER THE POLLS CLOSE – Any individual who votes in an election for Federal office as a result of a Federal or State court order or any other order extending the time established for closing the polls by a State law in effect 10 days before the date of that election may only vote in that election by casting as provisional ballot under subsection (a). Any such ballot cast under the preceding sentence shall be separated and held apart from other provisional ballots cast by those not affected by the order.	Yes			South Carolina has established a procedure for provisional ballots cast by voters in accordance with a court order extending the time established for closing the polls.

1.5 Computerized Statewide Voter Registration List & Voters Who Register by Mail

The chart below takes each of the requirements for the Computerized Statewide Voter Registration List and for Voters Who Register by Mail and describes South Carolina's plan to meet the requirement.

Section 303: Computerized Statewide Voter Registration List and Voters Who Register by Mail	S.C. Status: Meets Requirement	Meets Requirement Partially	New Capability to be Implemented	Implementation
(a) COMPUTERIZED STATEWIDE VOTER REGISTRATION LIST REQUIREMENTS				
(1) IMPLEMENTATION –				
(A) IN GENERAL – Each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State (in this subsection referred to as the "computerized list"), and includes the following:	Yes			South Carolina currently meets this requirement. A statewide voter registration system has been used in the State since 1968. SC currently maintains a single, uniform, official, centralized, interactive computerized statewide voter registration system at the state level. All 46 counties are connected to the statewide voter registration system. Additions and changes made by the county offices and State office to the voter registration file are interactive.
(i) The computerized list shall serve as the single system for storing and managing the official list of registered voters throughout the State.	Yes			South Carolina currently meets this requirement. The statewide voter registration system is housed at the State data center in Columbia and maintained by the State Election Commission. The State Election Commission provides an official list of registered voters for each election held in South Carolina.
(ii) The computerized list contains the name and registration information of every legally registered voter in the State.	Yes			South Carolina currently meets this requirement. Computerized list contains name, address, SS#, date of birth, precinct, and election districts for every legally registered voter in South Carolina.
(iii) Under the computerized list, a unique identifier is assigned to each legally registered voter in the State.	Yes			South Carolina currently meets this requirement. The system assigns each voter a unique registration number at the time they

Section 303: Computerized Statewide Voter Registration List and Voters Who Register by Mail	S.C. Status: Meets Requirement	S.C. Status: Meets Requirement Partially	S.C. Status: New Capability to be Implemented	Implementation
				register to vote.
(iv) The computerized list shall be coordinated with other agency databases with the State.	Yes			South Carolina currently meets this requirement. DMV, DSS, and other state agency databases are coordinated through Motor Voter processes. The counties access a file received on a weekly basis from these agencies to approve applications made through NVRA.
(v) Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list.	Yes			South Carolina currently meets this requirement. All local and state election officials have access to this file. Each local election official is assigned a USERID and password that must be used to access the official file of registered voters. Voters can also inquire via the SEC website to look at their own record to check status, address, election districts, and polling place by keying in their name and date of birth.
(vi) All voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official.	Yes			South Carolina currently meets this requirement. Local election officials have access to database constantly to enter new voter registrations or updates to voter's record on a real time basis.
(vii) The chief State election official shall provide such support as may be required so that local election officials are able to enter information as described in clause (vi).	Yes			South Carolina currently meets this requirement. Local voter registration officials have access to the official file on a continuous basis. Technical support is provided through staff at the State Election Commission and a Help Desk.
(viii) The computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State.	Yes			South Carolina currently meets this requirement. The State Election Commission currently prints and sends the official list of registered voters to the county for use in all elections that are held in the State.
(B) EXCEPTION – The requirement under subparagraph (A) shall not apply to a State in which, under a State law in effect continuously on and after the date of the enactment of this Act, there is no voter registration requirement for individuals in the State with respect to elections for Federal office.				Does not apply. South Carolina requires potential voters to register to vote.

Section 303: Computerized Statewide Voter Registration List and Voters Who Register by Mail	S.C. Status: Meets Requirement	S.C. Status: Meets Requirement Partially	S.C. Status: New Capability to be Implemented	Implementation
(2) COMPUTERIZED LIST MAINTENANCE –				
(A) IN GENERAL – The appropriate State or local election official shall perform list maintenance with respect to the computerized list on a regular basis as follows:				
(i) If an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), including subsections (a)(4), (c)(2), (d), and (e) of section 8 of such Act (42 U.S.C. 1973gg-6).	Yes			South Carolina currently meets this requirement. The State Election Commission is the only one authorized to remove names from the official list of registered voters.
(ii) For purposes of removing names of ineligible voters from the official list of eligible voters –				
(I) under section 8(a)(3)(B) of such Act (42 U.S.C. 1973gg-6(a)(3)(B)), the State shall coordinate the computerized list with State agency records on felony status; and	Yes			South Carolina currently meets this requirement. Felony records are removed by the State upon notification from courts of felony convictions on a monthly basis.
(II) by reason of the death of the registrant under section 8(a)(4)(A) of such Act (42 U.S.C. 1973gg-6(a)(4)(A)), the State shall coordinate the computerized list with State agency records on death	Yes			South Carolina currently meets this requirement. Deaths are removed by the State upon notification from DHEC on a monthly basis.
(iii) Notwithstanding the preceding provisions of this paragraph, if a State is described in section 4(b) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-2(b)), that State shall remove the names of ineligible voters from the computerized list in accordance with State law.	Yes			South Carolina currently meets this requirement. In accordance with the NVRA of 1993, a confirmation card policy is in effect and appropriate voters are removed as required.
(B) CONDUCT – The list maintenance performed under subparagraph (A) shall be conducted in a manner that ensures that –				
(i) the name of each registered voter appears in the computerized list;	Yes			South Carolina currently meets this requirement.
(ii) only voters who are not registered or who are not	Yes			South Carolina currently meets this requirement.

Section 303: Computerized Statewide Voter Registration List and Voters Who Register by Mail	S.C. Status			Implementation
	Meets Requirement	Meets Requirement Partially	New Capability to be Implemented	
eligible to vote are removed from the computerized list; and				Name, SS#, and date of birth verified on each voter before name removed from voter registration file.
(iii) duplicate names are eliminated from the computerized list.	Yes			South Carolina currently meets this requirement. State Election Commission performs quarterly comparison using SS# and date of birth. A report is generated listing all duplicate records. This report is distributed to County Registration Boards for confirmation before names are actually deleted by State Election Commission.
(3) TECHNOLOGICAL SECURITY OF COMPUTERIZED LIST – The appropriate State or local official shall provide adequate technological security measures to prevent the unauthorized access to the computerized list established under this section.	Yes			South Carolina currently meets this requirement. Old System: This IDMS mainframe system is secured by RACF. It is deployed over a SNA network or by EZ3270 TCP/IP emulator over the internet. The transmission of data is encrypted. New System: The users of this web application will be authenticated by an LDAP server. Each user will be assigned a unique USERID and password. The application is deployed over a secured Internet connection using HTTPS.
(4) MINIMUM STANDARD FOR ACCURACY OF STATE VOTER REGISTRATION RECORDS – The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:	Yes			South Carolina currently meets this requirement.
(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.	Yes			South Carolina currently meets this requirement. South Carolina has a confirmation mailing procedure consistent with the National Voter Registration Act of 1993.
(B) Safeguards to ensure that eligible voters are not removed	Yes			South Carolina currently meets this requirement.

Section 303: Computerized Statewide Voter Registration List and Voters Who Register by Mail	S.C. Status			Implementation
	Meets Requirement	Meets Requirement Partially	New Capability to be Implemented	
in error from the official list of eligible voters.				Name, SS#, and date of birth are compared on each voter before removal.
(5) VERIFICATION OF VOTER REGISTRATION INFORMATION –				
(A) REQUIRING PROVISION OF CERTAIN INFORMATION BY APPLICANTS –				
(i) IN GENERAL – Except as provided in clause (ii), notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes –				
(I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or	Yes			SC law requires full Social Security Number and does not accept the driver's license number as a valid alternative.
(II) in the case of any other applicant (other than an applicant to whom clause (ii) applies), the last 4 digits of the applicant's social security number.	Yes			South Carolina currently meets this requirement. SC requires full Social Security Number.
(ii) SPECIAL RULE FOR APPLICANTS WITHOUT DRIVER'S LICENSE OR SOCIAL SECURITY NUMBER – If an applicant for voter registration for an election for Federal office has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes. To the extent that the State has a computerized list in effect under this subsection and the lists assigns unique identifying numbers to registrants, the number assigned under this clause shall be the unique identifying number assigned under the list.	Yes			SC law requires full Social Security Number. Our voter registration system assigns a voter registration number to each applicant that is unique to each voter.
(iii) DETERMINATION OF VALIDITY OF NUMBERS PROVIDED – The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.	Yes			South Carolina currently meets this requirement.

Section 303: Computerized Statewide Voter Registration List and Voters Who Register by Mail	S.C. Status			Implementation
	Meets Requirement	Meets Requirement Partially	New Capability to be Implemented	
(B) REQUIREMENTS FOR STATE OFFICIALS –				
(i) SHARING INFORMATION IN DATABASES – The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.	Yes			Not applicable in South Carolina because the entire social security number is required by State law, and thus the State falls under (D) Special Rule for Certain States.
(ii) AGREEMENTS WITH COMMISSIONER OF SOCIAL SECURITY – The official responsible for the State motor vehicle authority shall enter into an agreement with the Commissioner of Social Security under section 205(r)(8) of the Social Security Act (as added by subparagraph (C)).				Not applicable in South Carolina because the entire social security number is required by State law, and thus the State falls under (D) Special Rule for Certain States.
(C) ACCESS TO FEDERAL INFORMATION –				South Carolina requires the full social security number by State law.
(D) SPECIAL RULE FOR CERTAIN STATES – In the case of a State which is permitted to use social security numbers, and provides for the use of social security numbers, on applications for voter registration, in accordance with section 7 of the Privacy Act of 1974, the provisions of this paragraph shall be optional.				South Carolina requires the full social security number by State law.
(b) REQUIREMENTS FOR VOTERS WHO REGISTER BY MAIL –				
(1) IN GENERAL – Notwithstanding section 6(c) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4(c)) and subject to paragraph (3), a State shall, in a uniform and nondiscriminatory manner, require an individual to meet the requirements of paragraph (2) if –				
(A) the individual registered to vote in a jurisdiction by mail; and	Yes			South Carolina currently meets this requirement.

Section 303: Computerized Statewide Voter Registration List and Voters Who Register by Mail	S.C. Status			Implementation
	Meets Requirement	Meets Requirement Partially	New Capability to be Implemented	
(B)(i) the individual has not previously voted in an election for federal office in the State; or	Yes			South Carolina currently meets this requirement.
(ii) the individual has not previously voted in such an election in the jurisdiction and the jurisdiction is located in a State that does not have a computerized list that complies with the requirements of subsection (a).	Yes			South Carolina currently meets this requirement.
(2) REQUIREMENTS –				
(A) IN GENERAL – An individual meets the requirements of this paragraph if the individual –				
(i) in the case of an individual who votes in person –				
(I) presents to the appropriate State or local election official a current and valid photo identification; or	Yes			South Carolina currently meets this requirement. Each voter is required to present one form of ID when voting in person: valid SC driver's license with current address, or photo ID issued by DMV with current address, or as shown below, a voter registration certificate.
(II) presents to the appropriate State or local election official a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter; or	Yes			South Carolina law permits the presentation of one specific government document – the voter registration certificate - to identify the voter.
(ii) in the case of an individual who votes by mail, submits with the ballot –				
(I) a copy of a current and valid photo identification; or.	Yes			South Carolina currently meets this requirement.
(II) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.	Yes			South Carolina law permits the presentation of one specific government document – the voter registration certificate - to identify the voter.
(B) FAIL-SAFE VOTING –				
(i) IN PERSON – An individual who desires to vote in person, but who does not meet the requirements of subparagraph (A)(i), may cast a provisional ballot under	Yes			South Carolina currently meets this requirement. SC provides provisional ballots at each precinct.

Section 303: Computerized Statewide Voter Registration List and Voters Who Register by Mail	S.C. Status: Meets Requirement	S.C. Status: Meets Requirement Partially	S.C. Status: New Capability to be Implemented	Implementation
section 302(a).				
(ii) BY MAIL – An individual who desires to vote by mail, but who does not meet the requirements of subparagraph (A)(ii), may cast such a ballot by mail and the ballot shall be counted as a provisional ballot in accordance with section 302(a).	Yes			South Carolina currently meets this requirement. SC provides provisional ballots for this purpose. The ballots are placed in a provisional envelope and kept separate from other absentee ballots until they are counted.
(3) INAPPLICABILITY – Paragraph (1) shall not apply in the case of a person –				
(A) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 and submits as part of such registration either	Yes			South Carolina currently meets this requirement.
(i) a copy of a current and valid photo identification; or	Yes			South Carolina currently meets this requirement. The voter registration system was modified to track whether voters who register by mail provide the proper ID. If proper ID is not provided, a notation will appear to the poll managers to obtain this information before allow the voter to cast a ballot.
(ii) a copy of a current utility bill, bank statement, government check, pay check, or government document that shows the name and address of the voter;	Yes			South Carolina currently meets this requirement.
(B)(i) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) and submits as part of such registration either –	Yes			South Carolina currently meets this requirement.
(I) a driver's license number; or	Yes			SC law requires full Social Security Number and does not accept the driver's license number as a valid alternative.
(II) at least the last 4 digits of the individual's social security number; and	Yes			South Carolina currently meets this requirement. SC requires applicant's complete SS# on all applications.
(ii) with respect to whom a State or local election official matches the information submitted under clause (i) with an	Yes			South Carolina currently meets this requirement.

Section 303: Computerized Statewide Voter Registration List and Voters Who Register by Mail	S.C. Status: Meets Requirement	S.C. Status: Meets Requirement Partially	S.C. Status: New Capability to be Implemented	Implementation
existing State identification record bearing the same number, name and date of birth as provided in such registration; or				
(C) who is –				
(i) entitled to vote by absentee ballot under the Uniformed and Oversea Citizens Absentee Voting Act (42 U.S.C. 1973ff-1 et seq.);	Yes			South Carolina tracks this exemption on applicant's electronic record by identifying applicant as UOCAVA.
(ii) provided the right to vote otherwise than in person under section 3(b)(2)(B)(ii) of the Voting Accessibility for the Elderly and Handicapped Act (42 U.S.C. 1973ee-1(b)(2)(B)(ii)); or	Yes			South Carolina tracks this exemption on applicant's electronic record.
(iii) entitled to vote otherwise than in person under any other Federal law.	Yes			South Carolina tracks this exemption on applicant's electronic record.
(4) CONTENTS OF MAIL-IN REGISTRATON FORM –				
(A) IN GENERAL – The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) shall include the following:				
(i) The question "Are you a citizen of the United States of America?" and boxes for the applicant to check to indicate whether the applicant to check to indicate whether the applicant is or is not a citizen of the United States.	Yes			This question appears on all voter registration applications used in South Carolina.
(ii) The question "Will you be 18 years of age on or before election day?" and boxes for the applicant to check to indicate whether or not the applicant will be 18 years of age or older on election day.	Yes			This question appears on all voter registration applications used in South Carolina.

Section 303: Computerized Statewide Voter Registration List and Voters Who Register by Mail	S.C. Status: Meets Requirement	S.C. Status: Meets Requirement Partially	S.C. Status: New Capability to be Implemented	Implementation
(iii) The statement "If you checked 'no' in response to either of these questions, do not complete this form".	Yes			This statement appears on all voter registration applications used in South Carolina.
(iv) A statement informing the individual that if the form is submitted by mail and the individual is registering for the first time, the appropriate information required under this section must be submitted with the mail-in registration form in order to avoid the additional identification requirements upon voting for the first time.	Yes			This statement appears on all voter registration applications used in South Carolina.
(B) INCOMPLETE FORMS – If an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i), the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law).	Yes			Standard procedure is that all county offices will notify voters that their application was incomplete and give them a period of time to submit missing information.
(c) PERMITTED USE OF LAST 4 DIGITS OF SOCIAL SECURITY NUMBERS – The last 4 digits of a social security number described in subsections (a)(5)(A)(i)(II) and (b)(3)(B)(i)(II) shall not be considered to be a social security number for purposes of section 7 of the Privacy Act of 1974 (5U.S.C. 522a note).				
(d) EFFECTIVE DATE –				

6. Proposed State Budget

The State of South Carolina's proposed budget for activities under this part, based on the State's best estimates of the costs of such activities and the amount of funds to be made available, including (A) specific information on the costs of the activities required to be carried out to meet the requirements of Title III; (B) the portion of the requirements payment which will be used to carry out activities to meet such requirements; and (C) the portion of the requirements payment which will be used to carry out other activities.

The implementation of HAVA in South Carolina will take place over four calendar years, as follows:

Year	Implementation
2003	◆ Voter registration System ◆ Election administration ◆ Voter education and poll worker training
2004	◆ Voting system purchases (15 counties) ◆ Election Administration ◆ Voter education and poll worker training ◆ Automate voter history
2005	◆ Voting system purchases (31 counties) ◆ Election Administration ◆ Voter education and poll worker training ◆ Scanning/signature verification systems
2006	◆ Election Administration ◆ Voter education and poll worker training

The implementation of this plan is contingent upon receipt of the associated federal funding. Implementation items may be combined if associated funds are received. Counties may implement ahead of their scheduled year if funds are available.

The total proposed funding[2] will come from the following sources:

	Total Federal Funding as Proposed	South Carolina Share as Proposed	South Carolina Matching Funds
Early payments	$650 M	$6.9 M	Not applicable
2003	$850 M ($825 M to States)	$11,602,190	$ 580,109.50
2004	$1.3 B ($1.1 B to States)	$ 20,819,090	$ 1,040,954.50
2005	$1.1 B ($900 M to States)	$ 0	$ 0
Total Funding	**$3.9 B**	**$39,321,280**	**$1,621,064**

Total anticipated funding for South Carolina, prior to 2005, was approximately $48,550,000. However, since South Carolina did not receive the expected allocation for 2005, projects were scaled back to reflect the shortfall in funding. The figures below have been adjusted accordingly. Should the 2005 allocation be received, the State Plan Advisory Committee will re-convene immediately upon receipt and revise this section accordingly. This money will be used to carry out the requirements of Title III as follows:

HAVA Requirements	Total Cost	Section 101 Funds	Section 102 Funds	Section 252 & 257 Funds	State Match
Statewide Voting System	$36.6 M	$ .5M	$2,167,518	$ 31.57 M	$ 1.59 M
Education	$ 2.4 M	$ .25 M		$ 2.45 M	$ .2 M
Statewide Voter Registration System	$ .3 M	$ .2 M			
Voter Registration and Outreach Programs	$ 1.2 M	$ .3 M		$ .8 M	$ .2 M
Administration	$ .4 M	$ .5 M		$ .86 M	$ .09 M
Total	**$ 40.9 M**	**$ 4,652,412**	**$ 2,167,518**	**$ 38.58 M**	**$ 1,977,500**

[2] Fund amounts are annotated with "M" or "B" to indicate million or billion dollar amounts.

12. Previous Year Plan

In the case of a State with a State plan in effect under this subtitle during the previous fiscal year, a description of how the plan reflects changes from the State plan for the previous fiscal year and of how the State succeeded in carrying out the State plan for such previous fiscal year.

Following a summary of changes to the 2004 State Plan:

1. Meeting Title III Requirements and Other Activities

A re-solicitation of the Request for Proposals (RFP) for a uniform statewide voting system was issued on June 9, 2004 and three proposals were received by the July 9, 2004 deadline. One proposal was determined to be non-responsive. The remaining two proposals were evaluated by a team of four election officials from county offices and one state election official. An intent to award was issued to Election Systems & Software (ES&S) on July 19, 2004. On August 4, 2004, the State Election Commission entered into a contract with ES&S for a uniform statewide voting system for South Carolina. By September 15, 2004, voting system equipment was delivered to 15 counties in the State. These first 15 counties are referred to as Phase I counties. All Phase I counties used the equipment, successfully, in the November 4, 2004 General Election.

Immediately after the November General Election, delivery of equipment to the remaining 31, Phase II, counties began. By April 10, 2005, all Phase II counties had receipt of their voting system. This completed the statewide deployment of the ES&S iVotronic touch-screen voting system in the State.

Section 301 – Voting System Standards

The iVotronic Voting System installed statewide provides for the following:

- A review screen that permits the voter to verify (in a private and independent manner) the ballot selections before casting a ballot
- Gives the voter the ability to make changes to the ballot or correct any errors before casting a ballot
- Will not allow a voter to vote for more candidates than allowed for each office
- Provides all HAVA required instructions on casting a ballot both on the machine and in the written form of posters and flyers
- Produces a permanent paper record for manual audit
- At least one DRE voting unit accessible to individuals with disabilities is available in each precinct in the State
- Meets HAVA requirements of compliance with Section 3.2.1 of the Federal Election Commission voting system standards

A uniform definition of what constitutes a vote was written specifically for the DRE and Optical Scan methods of voting. DRE units are used in the precinct on election day and in the absentee precinct preceding the election. Optical scan ballots are used for mail-out absentees, provisional purposes, and emergency use.

2. Payment Distribution and Monitoring

The following chart depicts a high level view of payment distribution as of May 31, 2005:

HAVA Requirements	Amount Distributed	Amount Encumbered
Statewide Voting System	$ 15,945,716.89	$ 19,000,000.00
Education	$ 1,081,715.42	
Statewide Voter Registration System	$ 67,790.63	
Voter Registration and Outreach Programs	$ 596,258.66	
Administration	$ 291,696.59	
Totals	**$ 17,983,178.19**	**$ 19,000,000.00**

3. Provision for Education and Training

3.1 Training for Election Officials

A statewide election security training class was held in January for all 46 counties. In June, 6 regional training classes were held with 100 people from 40 counties attending. 14 classes were held for the on-going statewide election official Training and Certification Program. Approximately 660 people (combined) were in attendance. This training is an on-going program.

A video was produced for use in training poll workers on the election day procedures associated with electronic voting machines. This video was distributed to all counties and will be available on the State Election Commission Intranet for county election officials.

3.3 Training for Voters

A website, www.scvotes.org, was developed and maintained with current information concerning South Carolina election laws and general information. The public can access this site to download voter registration forms, polling place location, FAQ's, contact information to ask specific questions, determine the status of their absentee or provisional ballot, and much more useful information.

In the summer of 2004, the State Election Commission issued a Request for Proposals (RFP) for a Voter Education and Outreach Program. After a protest hearing in July, two advertising/public relations firms, Advertising Services Agency (ASA) was selected to conduct the program.

Because of the limited timeframe between the award and the November General Election, 15 counties using new voting equipment were targeted for voter education on both HAVA changes and the new voting equipment. These counties were: Abbeville, Aiken, Anderson, Calhoun, Cherokee, Florence, Greenville, Greenwood, Kershaw, Lexington, Oconee, Pickens, Spartanburg, Union, and York.

A prepared voter education plan was put into use. Brochures that cover the entire voter registration and voting process were developed and distributed to all 46 counties and various public organizations. For the first time in South Carolina, a Braille brochure on a number of voter education subjects was printed with the assistance of the S.C. Association for the Blind.

Presentations on the use of the voting system were given to local media outlets in these 15 counties along with four 30 second television commercials. These commercials were shown 6088 times prior to the November 2004 General Election.

A brochure containing instructions on the use of the voting machines was produced and mailed to each registered voter in these 15 counties.

A "How to Vote" video was produced and distributed to all 46 county offices and is also available on the SCVOTES.org website for public viewing.

A HAVA bus was purchased and outfitted with electronic voting machines, election information flyers, and an outside red/white and blue design with the www.scvotes.org website. This bus was used to travel to scheduled sites and provide instruction to voters on how to use the voting system and also provide publicity of HAVA changes associated with voter registration and voting. Newspaper, radio, and publicity tactics were used to announce when and where the bus would be visiting.

4. Voting System Guidelines and Processes

An instructional flyer and posters were created to provide instruction on new voting machines. A process for State supported ballot creation was developed and counties were required to notify the State Election Commission of the level of service they desired in support of the new voting system.

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5. Fund for Administering State Activities

- $ 32,421,280.00 Title II monies were received and placed into an interest bearing account.
- $ 278,702 was accrued in interest
- $1,621,064 was required as the State 5% match

6. Proposed State Budget

$7,128,720 estimated 2005 Federal Funding was not received and the proposed funding spreadsheets were revised to reflect actual amounts received from the Federal Government.

7. Maintenance of Prior Year Expenditures

None of the HAVA funds were used to maintain normal operating expenses. All expenses are associated with requirements of this Plan and can be linked to specific categories listed in the proposed funding spreadsheet listed in Section 6.

8. Performance Goals and Measures

Performance goals were established and are monitored monthly by SEC staff. A status of State Plan implementation progress is updated and posted on the SEC website.

9. Administrative Complaint Procedures

Two complaints were received during this period and were handled without alternate dispute resolution.

10. Use of Title I Payment

Portions of the Title I payment were used to fund the statewide voting system, voter education and outreach initiatives, and training to state and county election officials.

11. Ongoing Management of Plan

An advisory team of 10 people was appointed in 2004 to oversee changes to the plan. This same team, with the exception of one member, met to discuss and approve revisions to the State Plan.

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August 25, 2005

Part IV

Environmental Protection Agency

40 CFR Part 63

National Emissions Standards for Hazardous Air Pollutants: Reinforced Plastic Composites Production; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[OAR–2003–0003; FRL–7957–8]

RIN 2060–AM23

National Emissions Standards for Hazardous Air Pollutants: Reinforced Plastic Composites Production

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; amendments.

SUMMARY: On April 12, 2003, the EPA issued national emission standards for hazardous air pollutants (NESHAP) for reinforced plastics composites production, which were issued under section 112 of the Clean Air Act (CAA). This action will amend the final rule to revise compliance options for open molding, correct errors, and add clarifications to sections of the rule that were not clear.

In the Rules and Regulations section of this **Federal Register**, we are taking direct final action on the proposed amendments because we view the amendments as noncontroversial and anticipate no adverse comments. We have explained our reasons for the amendments in the direct final rule. If we receive no adverse comments, we will take no further action on the proposed amendments. If we receive adverse comments, we will withdraw only those provisions on which we received adverse comments. We will publish a timely withdrawal in the **Federal Register** indicating which provisions will become effective and which provisions are being withdrawn. If part or all of the direct final rule in the Rules and Regulations section of today's **Federal Register** is withdrawn, all comments pertaining to those provisions will be addressed in a subsequent final rule based on the proposed amendments. We will not institute a second comment period on the subsequent final action. Any parties interested in commenting must do so at this time.

DATES: *Comments.* Written comments must be received on or before September 26, 2005 unless a hearing is requested by September 6, 2005. If a hearing is requested, written comments must be received on or before October 11, 2005.

Public Hearing. If anyone contacts the EPA requesting to speak at a public hearing, a public hearing will be held on September 8, 2005.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2003–0003, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket*. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- E-mail: *a-and-r-docket@epa.gov* and *barnett.keith@epa.gov*.
- Fax: (202) 566–1741 and (919) 541–5600.
- Mail: U.S. Postal Service, send comments to: HQ EPA Docket Center (6102T), Attention Docket ID No. OAR–2003–0003, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a duplicate copy, if possible.
- Hand Delivery: In person or by courier, deliver comments to: HQ EPA Docket Center (6102T), Attention Docket ID No. OAR–2003–0003, 1301 Constitution Avenue, NW., Room B–108, Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. Please include a duplicate copy, if possible.

We request that you also send a separate copy of each comment to the contact person listed below (see **FOR FURTHER INFORMATION CONTACT**).

Instructions: Direct your comments to Docket ID No. OAR–2003–0003. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket*, including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. Send or deliver information identified as CBI only to the following address: Mr. Roberto Morales, OAQPS Document Control Officer, EPA (C404–02), Attention Docket ID No. OAR–2003–0003, Research Triangle Park, NC 27711. Clearly mark the part or all of the information that you claim to be CBI. The EPA EDOCKET and the Federal regulations.gov websites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the HQ EPA Docket Center, Docket ID No. OAR–2003–0003, EPA West Building, Room B–102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the HQ EPA Docket Center is (202) 566–1742. A reasonable fee may be charged for copying docket materials.

Public Hearing. If a public hearing is held, it will be held at 10 a.m. at the EPA's Environmental Research Center Auditorium, Research Triangle Park, North Carolina or at an alternate site nearby.

FOR FURTHER INFORMATION CONTACT: Mr. Keith Barnett, EPA, Office of Air Quality Planning and Standards, Emission Standards Division, Minerals and Inorganic Chemicals Group (C504–05), Research Triangle Park, North Carolina 27711; telephone number (919) 541–5605; facsimile number (919) 541–5600; e-mail address: *barnett.keith@epa.gov*.

SUPPLEMENTARY INFORMATION:

Regulated Entities. Categories and entities potentially regulated by this action include:

Category	NAICS[1] code	Examples of regulated entities
Industry	325211, 326122, 325991, 326191, 327991, 327993, 332998, 33312, 33651, 335311, 335313, 335312, 33422, 336211, 336112, 336211, 33651, 33635, 336399, 33612, 336213, 336413; and 336214.	Reinforced plastic composites production facilities that manufacture intermediate and/or final products using styrene containing thermoset resins and gel coats.
Federal Government		Federally owned facilities that manufacture intermediate and/or final products using styrene containing thermoset resins and gel coats.

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. To determine whether your facility is regulated by this action, you should examine the applicability criteria in 40 CFR 63.5785 and 40 CFR 63.5787 of the final NESHAP. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Submitting CBI. Do not submit this information to EPA through EDOCKET, regulations.gov, or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

Public Hearing. Persons interested in presenting oral testimony or inquiring as to whether a hearing is to be held should contact Ms. Janet Eck, EPA, Office of Air Quality Planning and Standards, Emission Standards Division, Coatings and Consumer Products Group (C539–03), Research Triangle Park, North Carolina 27711, telephone number (919) 541–7946, e-mail address: *eck.janet@epa.gov.*, at least 2 days in advance of the potential date of the public hearing. Persons interested in attending the public hearing must also call Ms. Eck to verify the time, date, and location of the hearing. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning these proposed emission standards.

Worldwide Web (WWW). In addition to being available in the docket, an electronic copy of today's proposal will also be available through the WWW. Following the Administrator's signature, a copy of this action will be posted on EPA's Technology Transfer Network (TTN) policy and guidance page for newly proposed or promulgated rules *http://www.epa.gov/ttn/oarpg/*. The TTN at EPA's Web site provides information and technology exchange in various areas of air pollution control.

Direct Final Rule. A direct final rule identical to the proposal is published in the Rules and Regulations section of today's **Federal Register**. If we receive any adverse comment pertaining to the amendments in the proposal, we will publish a timely notice in the **Federal Register** informing the public that the amendments are being withdrawn due to adverse comment. We will address all public comments concerning the withdrawn amendments in a subsequent final rule. If no relevant adverse comments are received, no further action will be taken on the proposal, and the direct final rule will become effective as provided in that action.

The regulatory text for the proposal is identical to that for the direct final rule published in the Rules and Regulations section of today's **Federal Register**. For further supplementary information, the detailed rationale for the proposal and the regulatory revisions, see the direct final rule published in a separate part of this **Federal Register**.

Statutory and Executive Order Reviews

For a complete discussion of all of the administrative requirements applicable to this action, see the direct final rule in the Rules and Regulations section of today's **Federal Register**.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impact of today's technical amendments on small entities, a small entity is defined as: (1) A small business ranging from 500 to 1,000 employees as defined by the Small Business Administration's size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule amendments on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The rule amendments will not impose any new requirements on small entities. Today's action includes direct final rule amendments that resolve inconsistencies, clarify language, and add additional compliance flexibility. None of the amendments will have any discernible effect on the stringency of the rule. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

Dated: August 16, 2005.

Stephen L. Johnson,

Administrator.

[FR Doc. 05–16700 Filed 8–24–05; 8:45 am]

BILLING CODE 6560–50–P

Federal Register

Thursday,
August 25, 2005

Part V

Environmental Protection Agency

40 CFR Part 63

National Emissions Standards for Hazardous Air Pollutants: Reinforced Plastic Composites Production; Direct Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[OAR–2003–0003; FRL–7957–7]

RIN 2060–AM23

National Emissions Standards for Hazardous Air Pollutants: Reinforced Plastic Composites Production

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule; amendments.

SUMMARY: The EPA is taking direct final action on amendments to the national emissions standards for hazardous air pollutants (NESHAP) for reinforced plastic composites production which were issued April 12, 2003, under section 112 of the Clean Air Act (CAA). The direct final amendments revise compliance options for open molding, correct errors, and add clarification to sections of the rule. We are issuing the amendments as a direct final rule, without prior proposal, because we view the revisions as noncontroversial and anticipate no adverse comments. However, in the Proposed Rules section of this **Federal Register** notice, we are publishing a separate document that will serve as the proposal to amend the NESHAP for reinforced plastic composites production if adverse comments are filed.

DATES: The direct final rule is effective on October 24, 2005 without further notice, unless EPA receives adverse written comment by September 26, 2005 or if a public hearing is requested by September 6, 2005. If adverse comments are received, EPA will publish a timely withdrawal in the **Federal Register** indicating which provisions will become effective and which provisions are being withdrawn due to adverse comment.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2003–0003, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket*. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- E-mail: *a-and-r-docket@epa.gov* and *barnett.keith@epa.gov*.
- Fax: (202) 566–1741 and (919) 541–5600.
- Mail: U.S. Postal Service, send comments to: HQ EPA Docket Center (6102T), Attention Docket ID No. OAR–2003–0003, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a total of two copies. We request that you also send a separate copy of each comment to the contact person listed below (see **FOR FURTHER INFORMATION CONTACT**).
- *Hand Delivery:* In person or by courier, deliver comments to: HQ EPA Docket Center (6102T), Attention Docket ID No. OAR–2003–0003, 1301 Constitution Avenue, NW., Room B–108, Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. Please include a total of two copies.

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Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hardcopy at the HQ EPA Docket Center, Docket ID No. OAR–2003–0003, EPA West Building, Room B–102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the HQ EPA Docket Center is (202) 566–1742. A reasonable fee may be charged for copying docket materials.

FOR FURTHER INFORMATION CONTACT: For further information contact Mr. Keith Barnett, EPA, Office of Air Quality Planning and Standards, Emission Standards Division, Minerals and Inorganic Chemicals Group (C504–05), Research Triangle Park, North Carolina 27711; telephone number (919) 541–5605; fax number (919) 541–5600; e-mail address: *barnett.keith@epa.gov*.

SUPPLEMENTARY INFORMATION:

Regulated Entities. Categories and entities potentially regulated by this action include:

Category	NAICS code[1]	Examples of regulated entities
Industry	325211, 326122, 325991, 326191, 327991, 327993, 332998, 33312, 33651, 335311, 335313, 335312, 33422, 336211, 336112, 336211, 33651, 33635, 336399, 33612, 336213, 336413; and 336214.	Reinforced plastic composites production facilities that manufacture intermediate and/or final products using styrene containing thermoset resins and gel coats.

Category	NAICS code[1]	Examples of regulated entities
Federal Government	.....	Federally owned facilities that manufacture intermediate and/or final products using styrene containing thermoset resins and gel coats.

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. To determine whether your facility is regulated by this action, you should examine the applicability criteria in 40 CFR 63.5785 and 40 CFR 63.5787 of the final NESHAP. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Worldwide Web (WWW). In addition to being available in the docket, an electronic copy of today's final NESHAP will also be available on the WWW through the Technology Transfer Network (TTN). Following the Administrator's signature, a copy of the NESHAP will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg/*. The TTN provides information and technology exchange in various areas of air pollution control.

Comments. We are publishing the direct final rule amendments without prior proposal because we view the amendments as noncontroversial and do not anticipate adverse comments. However, in the Proposed Rules section of this **Federal Register** notice, we are publishing a separate document that will serve as the proposal to amend the NESHAP for reinforced plastic composites production if adverse comments are filed. If we receive any adverse comments on one or more distinct amendments, we will publish a timely withdrawal in the **Federal Register** informing the public which provisions will become effective, and which provisions are being withdrawn due to adverse comment. We will address all public comments in a subsequent final rule, should the Agency determine to issue one. Any of the distinct amendments in today's direct final rule for which we do not receive adverse comment will become effective on the previously mentioned date. We will not institute a second comment period on the direct final rule amendments. Any parties interested in commenting must do so at this time.

Judicial Review. Under section 307(b)(1) of the CAA, judicial review of the direct final rule amendments is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by October 24, 2005. Under section 307(d)(7)(B) of the CAA, only an objection to the direct final rule amendments that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by the direct final rule amendments may not be challenged separately in any civil or criminal proceeding brought by EPA to enforce these requirements.

Outline. The information presented in this preamble is organized as follows:

I. Background

The EPA promulgated NESHAP for reinforced plastic composites production on April 21, 2003. The final rule (40 CFR part 63, subpart WWWW) includes standards for hazardous air pollutants (HAP), as well as monitoring, performance testing, recordkeeping, and reporting requirements related to those standards. After promulgation of the rule, EPA received numerous questions relating to rule interpretation. The questions pointed out minor inconsistencies in some of the tables and the rule language, areas where the rule requirements were not clear, and restrictions that would preclude most facilities using the least burdensome open molding compliance option. Today's action includes direct final rule amendments that resolve inconsistencies, clarify language, and add additional compliance flexibility. None of the amendments will have any discernable effect on the stringency of the rule.

II. Amendments to 40 CFR Part 63, Subpart WWWW

This subpart applies to facilities that manufacture reinforced plastic composites and are located at major sources of hazardous air pollutants. For more information on rule applicability see 40 CFR 63.5785.

The EPA received numerous questions relating to rule requirements for polymer casting and closed molding operations. These operations were mentioned in the rule or rule preamble so it would be clear that they were covered by the rule. However, we did not list any requirements for these operations in the rule, except for compression/injection closed molding which has a work practice requirement. In order to make it clear these operations have no requirements, polymer casting and closed molding operations (except for compression/injection molding) have been added to the list of operations with no requirements in 40 CFR 63.5790(c). We also added language to that paragraph to clarify that though certain operations have no requirements, any requirements that apply to co-located operations are not affected.

A question was raised concerning area sources that commenced construction prior to August 2, 2002, but did not become a major source until after August 2, 2002. The final rule language in 40 CFR 63.5795(a)(2) appears to imply that any area source that became major due to an expansion or other type of construction after August 2, 2002, would be considered a new source because it was not an affected source prior to commencing construction. Our intent was that any existing source would not become a new source as the result of reconstruction. Therefore, we are changing the sentence ''You commence construction, and no other reinforced plastic composites production affected source exists at that site'' by removing the word affected from the sentence. The new language will now read ''You commence construction, and no other reinforced plastic composites production source exists at that site.'' Therefore, it will

now be clear that an area source that existed prior to August 3, 2002 will not be considered a new source once it becomes major due to an expansion or other type of reconstruction.

In 40 CFR 63.5799, the first sentence of paragraph (a) refers to paragraphs (b) and (d) of 40 CFR 63.5805. Paragraph (b) of 40 CFR 63.5805 discusses existing source requirements. We should have referenced paragraph (c) of 40 CFR 63.5805, which discusses requirements for new facilities. We have changed the rule text to correct this.

Also in 40 CFR 63.5799(b), we included a sentence that stated ''If an existing facility has accepted an enforceable permit limit of less than 100 tons per year of HAP, and can demonstrate that they will operate at that level subsequent to the compliance date, then they can be deemed to be below the 100 tons per year (tpy) threshold.'' We received a comment that this sentence implies that a facility that used process controls could not use a permit limit of 100 tons per year (tpy) to demonstrate they were below the 100 tpy threshold. Our intent was that any facility that could demonstrate, through its permit requirements, that it would be below the 100 tpy threshold would not have to perform emission calculations. Therefore, we have changed the sentence to read ''If an existing facility has accepted an enforceable permit limit that would result in emissions of less than 100 tpy of HAP measured prior to any add-on controls, and can demonstrate that they will operate at that level subsequent to the compliance date, they can be deemed to be below the 100 tpy threshold.'' This should make it clear that both restricted operation hours and use of process controls are acceptable methods to demonstrate through permit requirements that the facility will not meet nor exceed the 100 tpy threshold.

We received numerous questions concerning 40 CFR 63.5805, specifically concerning when the 95 percent control requirement applied to existing sources, and which operations were potentially subject to 95 percent control. We have revised the wording of 40 CFR 63.5805 to make it more clear by changing paragraphs (a) and (b). Paragraph 40 CFR 63.5805(a) now discusses only the limits applicable to centrifugal casting and continuous lamination/casting operations, rather that all operations at existing sources. Paragraph 40 CFR 63.5805(b) discusses all operations at existing sources not covered in paragraph 40 CFR 63.5805(a). No requirements have changed as result of this revision.

We received several questions relating to the values for the highest organic HAP content for compliant materials shown in Table 3 to subpart WWWW of part 63. In one case, a local regulatory agency wanted to write the organic HAP limits in Table 3 to subpart WWWW as absolute permit limits. In another case, someone interpreted the organic HAP limits as absolute limits not to be exceeded.

The purpose of the highest organic HAP content for compliant materials shown in Table 3 to subpart WWWW was only to provide examples of compliant materials, and these values are not emission limits or HAP content limits. The actual emission limits are the pounds per ton (lb/ton) limits in the third column of Table 3 to subpart WWWW. If you meet the lb/ton limits in the third column of Table 3 to subpart WWWW, you are in compliance, regardless of the HAP content of the resin or gel coat.

In order to clarify our intent, we have removed the fourth column from Table 3 to subpart WWWW and reorganized the discussion of compliance options in 40 CFR 63.5810. Paragraph (a) of 40 CFR 63.5810 now covers how to determine if a specific resin or gel coat, as applied, meets its applicable emission limit. Paragraph (b) of 40 CFR 63.5810 covers averaging within each individual combination of operation type and resin application method or gel coat type. Paragraph (c) of 40 CFR 63.5810 covers demonstrating compliance using a weighted average emission limit. Paragraph (d) of 40 CFR 63.5810 covers options where you can meet the organic HAP emissions limit for one resin application method and use the same resin for all application methods of that resin type.

After promulgation, it was pointed out to EPA that for a facility to be able to use the compliant materials compliance option, all materials would have to be compliant. Therefore, even if a facility used numerous resin and gel coats, having one noncompliant material would require all materials be included in some type of averaging. This would not result in any additional emissions reductions, but would increase the amount of reporting and recordkeeping.

A second comment concerned the use of the term ''compliant materials.'' It was pointed out that it is the combination of a specific resin or gel coat, the application method, and controls that determine compliance, not the resin or gel coat alone. For example, a 38 percent HAP resin applied with nonatomized spray has an emission factor that is below its corresponding emission limit and, therefore, would comply with its applicable emission limit. However, if the same resin is applied manually, its emission factor would be above its corresponding emission limit, and to comply with the rule, this combination of resin and application method would have to be averaged with other operations. This specific resin, as applied, complies in one case, but not the other. Therefore, using the term compliant materials is misleading.

For this reason, we have modified 40 CFR 63.5810 to clarify that when a specific resin or gel coat, as applied, meets the applicable emission limit, then it is in compliance, and we have dropped the term compliant materials from the rule. We are also modifying the rule to allow facilities to both demonstrate compliance for some resins and gel coats using averaging, and that some individual resins and gel coats, as applied, comply with their emission limits. This change will have no impact on the actual rule limits and should result in no change in HAP emissions, but may reduce the required reporting and recordkeeping. We have also revised paragraph (d) of 40 CFR 63.5895, which discusses collecting data to demonstrate continuous compliance, to reflect this change in compliance options. We are limiting this flexibility for a specific resin or gel coat to state that if a specific resin or gel coat is being used in any averaging calculations, then all of that specific resin or gel coat resin must be part of averaging, even if the resin, as applied, would meet its applicable emission limit. You must collect resin use data for any resin or gel coat that is involved in averaging.

In paragraph (a) of 40 CFR 63.5810, we state that you may demonstrate compliance for an individual resin or gel coat based on the HAP content, application method, and any controls that reduce its emission factor. As an example, a non-corrosion resistant/high strength (non-CR/HS) resin with an organic HAP content of 38 percent, applied using nonatomized spray, would have an emission factor of 86 lb/ton calculated using Equation 1.c.i of table 1 to subpart WWWW of part 63. The emission limit for this operation as shown in table 3 to subpart WWWW of part 63 is 88 lb/ton. Therefore, this resin, as applied, complies with its emission limit. If the facility switches to atomized resin application, the emission factor would change to 183 lb/ton, and the resin would not comply with its emission limit.

A second example of demonstrating compliance for an individual resin or

gel coat would be a 41 percent HAP resin that contains a vapor suppressant with a vapor suppressant effectiveness factor of 0.5 applied using nonatomized spray. The emission factor calculated using Equation 1.c.i from table 1 to subpart WWWW of part 63 would be 74.2 lb/ton. This is below the emission limit of 88 lb/ton. Therefore, this resin, as applied complies with its emission limit as long as nonatomized mechanical application and vapor suppressant continue to be used.

If a facility required to meet the limits in table 3 to subpart WWWW of part 63 has some type of add-on control, the control efficiency may be used to show compliance. For example, a facility that uses a 35 percent HAP white gel coat with atomized spray has an emission factor of 335.5 lb/ton, which is above the allowable emission limit of 267 lb/ton. Therefore, this gel coat, as applied, does not comply with its emission limit. However, if the facility controlled the gel coat spray booth emissions by 47.5 percent overall (50 percent capture efficiency and 95 percent control), the emission factor would now be 176 lb/ton, and the gel coat does comply. This would require that the facility demonstrate the capture and control efficiency using the appropriate test methods in the NESHAP.

We have also added a paragraph (d)(4) to 40 CFR 63.5810 that states if a facility elects to comply using the option in paragraph (d) of 40 CFR 63.5810 and uses resins that meet the organic HAP limits in table 7 to subpart WWWW of part 63, then those individual resins would be considered to be in compliance, and resin use records are not required.

A commenter stated that some pultrusion machines have multiple preform and pre-wet areas prior to the die. This configuration is incompatible with the language of 40 CFR 63.5830(b)(4) because this language would only be correct for one pre-wet area. Therefore, we have revised the language so multiple preform and pre-wet areas can be used. This change does not affect the total amount of area allowed to be open and should not have any impact on control effectiveness.

A commenter stated that some direct die injection systems do not recycle resin drip directly back to the resin injection chamber. It is recycled back to the process. We agree that recycling the resin back to the process would result in no additional emissions and have modified the description of direct die injection in 40 CFR 63.5830(c)(3) to reflect this.

Another commenter stated that they manufactured large pultruded parts that currently do not meet the large parts definition of 1,000 reinforcements and a cross sectional area of 60 inches or more shown in footnote 6 of table 3 to subpart WWWW of part 63. These parts were well over 60 inches of cross sectional area but contain large roving and stitched fabrics for reinforcement. They maintained that these parts should be included in the large parts definition because the factors we used to determine what made a part large, *i.e.*, part size and complexity, were as relevant here as they would be if they replaced the fabric and larger roving with a smaller roving and more individual reinforcements to meet the 1,000 reinforcement requirement.

We agree with this comment and have changed the definition of large pultruded parts for existing pultrusion operations in footnote 6 to table 3 of subpart WWWW of part 63 to 60 square inches or more and 1,000 reinforcements, or 60 square inches or more and the glass equivalent of 1,000 ends of 113 yield roving. This change also includes correcting the cross sectional measure to 60 square inches, not 60 inches. We also made corresponding changes to item 9 of table 9 to subpart WWWW of part 63.

We received a comment that equation 2 in 40 CFR 63.5885 was in error because, based on the definition of uncontrolled wet-out area organic HAP emissions, the equation did not account for emissions that are captured and vented to a control device. We agreed with this comment and have revised equations 2 and 3 of 40 CFR 63.5885 to account for all emissions generated in the wet-out areas.

A commenter noted that we did not specify how a source was to report changing compliance options. We have added paragraph (i) to 40 CFR 63.5910 that requires the source to state if they changed compliance options in their next compliance report.

We made several corrections to the definitions in 40 CFR 63.5935 in response to comments. In the definition for ''high performance gel coat,'' we had listed the National Science Foundation as a source of property testing standards. This should have been the National Sanitation Foundation. We changed the definition of ''mixing'' to include mixing of putties or polyputties. In the definition for ''neat resin plus,'' we had left the word ''plus'' out of the last sentence. In the definition of ''polymer casting,'' a commenter noted that sometimes polymer casters vibrate or smooth the material. We added language to the ''polymer casting'' definition to make it clear that vibrating or smoothing the resin is not considered rolling out or working the resin.

We made several changes to table 1 to subpart WWWW of part 63. We corrected a typographical error in the column numbering. We also corrected equation 1.f where we had an error on the first term of the equation and added a new equation to calculate emissions from atomized spray gel coat using robotic or automated spray. Finally, we added a footnote to table 1 to subpart WWWW of part 63 stating that the equations presented are intended for use to determine compliance with the rule and do not preclude the use of other emission factors to calculate emissions for other purposes, such as reports required by their title V permit. The reason for this change was an industry concern that State and local regulators were requiring sources to use the equations in table 1 to subpart WWWW of part 63 in lieu of potentially more accurate factors. However, this footnote does not preclude a facility from using the equations in table 1 to subpart WWWW of part 63 if these equations are deemed to be the most accurate available.

Several changes were made to table 3 to subpart WWWW of part 63 based on comments and questions received after promulgation of the final rule. We received a comment that for three of the operations in table 1 to subpart WWWW of part 63, substituting the value for the highest HAP content for a compliant resin in column four into the equations in table 1 to subpart WWWW of part 63 resulted in a calculated emission factor that was above the corresponding emission limit. This should not happen if the resin or gel coat is considered compliant. On further review, we discovered that the error was due to the way we rounded the calculations during floor development. As a result, the facilities that set the floor for these three operations would not be in compliance. We do not believe that the rounding procedure should result in a floor-setting facility to now be out of compliance with the floor. Therefore, we changed the rounding technique used to calculate the emission limits for the open molding operations in table 3 to subpart WWWW of part 63. The result was the emission limits for the three operations noted by the commenter changed slightly. The limit for open molding, CR/HS resins, mechanical resin application changed from 112 to 113 lb/ton. The emission limit for non-CR/HS resin, mechanical resin changed from 87 to 88 lb/ton. The emission limit for open molding, tooling gel coat changed from 437 to 440 lb/ton. These changes will not affect the costs

of compliance or emissions reductions of the rule. The changes simply make the floor emission limits consistent with the facilities setting the floors. The changes in table 3 to subpart WWWW of part 63 also slightly changed the calculated maximum HAP content for these processes shown in table 7 to subpart WWWW of part 63, and we have updated table 7 to subpart WWWW of part 63 to reflect the changes in table 3 to subpart WWWW of part 63.

One commenter stated that regulated sources were confused on which emission limit to use for shrinkage controlled resins when the resin is used to make tools. We added a footnote to clarify that a shrinkage controlled resin is subject to the emission limits in item 5 of table 3 to subpart WWWW of part 63 regardless of whether it is used as a tooling or a production resin.

In table 3 to subpart WWWW of part 63 we did not have emission limits for manually applied gel coat because we did not have data to develop specific limits. In the footnotes, we stated that for compliance purposes, manually applied gel coat should be treated as if it were applied using spray guns. In table 1 to subpart WWWW of part 63, we had an equation to calculate an emission factor for manual gel coat application, but we stated not to use the equation for compliance purposes. We believe this has caused some confusion. Therefore, we have removed the manual gel coat equation from table 1 to subpart WWWW of part 63 because this equation is not necessary to show compliance with the NESHAP. We have also revised the footnote concerning manual gel coat application in table 3 to subpart WWWW of part 63 to make it more clear that to demonstrate compliance for manually applied gel coat you treat manually applied gel coat as if it were applied using spray equipment.

A commenter noted that footnote 1 should apply to items 6 and 7 of table 4 to subpart WWWW of part 63, not just to item 8. We agree with this comment and have revised table 4 to subpart WWWW of part 63 accordingly.

A commenter noted that table 7 to subpart WWWW of part 63 as written implied that, for items 1.a and 4.a, it would be permissible to use atomized mechanical application. This was not our intent. The compliance options in table 7 were intended to provide additional flexibility to regulated sources by allowing the use of the same resin in different operations. The organic HAP limits based on mechanical resin application were all determined using nonatomized spray. Therefore, we have added a footnote to items 1.a and 4.a. of table 7 to subpart WWWW of part 63 to state that nonatomized resin application is required.

A commenter noted that the language in item 5.a.ii of table 8 to subpart WWWW of part 63 implies that all pultrusion machines at existing sources must reduce emissions by 60 weight percent, while the language in 40 CFR 63.5830(e)(2) states that facilities may demonstrate compliance if the weighted average reduction based on resin throughput for all machines combined in 60 percent. We have revised item 5.a.ii of table 8 to subpart WWWW of part 63 to make the language consistent with 40 CFR 63.5830(e)(2). We also changed 40 CFR 63.5830(e)(2) to correct a spelling error.

We received several questions concerning the applicability of rule requirements to filler putties used to fill gaps or smooth sharp corners. We did not specifically investigate these materials in the rulemaking. Putties are sometimes made on site using production resin, but are also purchased as a separate product. We noted that the NESHAP for Boat Manufacturing exempted putties, polyputties, and adhesives from any requirements. Because we cannot say with certainty that filler putties could meet the emission limits for manual resin application, we are amending the rule to exclude putties, polyputties, and adhesives from any emission limits. This will make the Reinforced Plastic Composites Production NESHAP consistent with the Boat Manufacturing NESHAP. However, any emissions from mixing of putties and polyputties would be subject to the appropriate mixing emission limits or work practices. We do not believe this will result in any change in the stringency of the NESHAP for two reasons. First, most facilities use very small amounts of putty compared to their use of resin and gel coat. Second, the small amount of putty used will have a very small surface area relative to the volume and be highly filled, which will tend to result in less emissions than a comparable volume of resin or gel coat.

We also have amended §§ 63.5900, 63.5910, and 63.5915 of 40 CFR part 63 to parallel changes in other sections and incorporate paragraph referencing changes.

III. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the EPA must determine whether this regulatory action is ''significant'' and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Executive Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is, therefore, not subject to OMB review.''

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This action adds clarifications and corrections to the final standards. However, the OMB has previously approved the information collection requirements contained in the existing regulations (68 FR 36982, June 20, 2003) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* and has assigned OMB control number 2060–0509 (EPA ICR No. 1976.02). A copy of the Information Collection Request (ICR) may be obtained from Susan Auby by mail at the Office of Environmental Information, Collection Strategies Division (2822), EPA, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, by e-mail at *auby.susan@epa.gov*, or by calling (202) 566–1672. You also may download a copy from the Internet at *http://www.epa.gov/icr.* Include the ICR number in any correspondence.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the

existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9.

C. Regulatory Flexibility Analysis

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with the direct final rule amendments.

For purposes of assessing the impacts of today's final rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administrations' regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's direct final rule amendments on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. We have determined that the direct final rule amendments will not impose any new requirements on small entities. Today's action includes direct final rule amendments that resolve inconsistencies, clarify language, and add additional compliance flexibility. None of the amendments will have any discernable effect on the stringency of the rule.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year. Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires us to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows us to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that the direct final rule amendments do not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. The direct final rule amendments apply only to affected sources in the reinforced plastic composites industry and clarify and correct errors in the final rule and, therefore, add no additional burden on sources. Thus, the direct final rule amendments are not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

The direct final rule amendments do not have federalism implications. They will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. No reinforced plastic composites production facilities subject to the direct final rule amendments are owned by State or local governments. Therefore, State and local governments will not have any direct compliance costs resulting from the direct final rule amendments. Furthermore, the direct final rule amendments do not require these governments to take on any new responsibilities. Thus, Executive Order 13132 does not apply to the direct final rule amendments.

F. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' The direct final rule amendments do not have tribal implications as specified in Executive Order 13175. They will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, because we are not aware of any Indian tribal governments or communities affected by the direct final rule amendments. Thus, Executive Order 13175 does not apply to the direct final rule amendments.

The EPA specifically solicits additional comment on the direct final rule amendments from tribal officials.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives

considered by the Agency. The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. The direct final rule amendments are not subject to Executive Order 13045 because they are based on technology performance and not on health or safety risks. They are also not considered ''economically significant'' as defined under Executive Order 12866.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

The direct final rule amendments are not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because they are not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act (NTTAA) of 1995, Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The VCS are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through the OMB, explanations when the Agency decides not to use available and applicable VCS.

The direct final rule amendments do not involve technical standards. Therefore, EPA is not considering the use of any VCS.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801, *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing the direct final rule amendments and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to publication of the direct final rule amendments in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The direct final rule amendments are not a ''major rule'' as defined by 5 U.S.C. 804(2). The direct final rule amendments are effective on October 24, 2005.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, and Reporting and recordkeeping requirements.

Dated: August 16, 2005.

Stephen L. Johnson,

Administrator.

For the reasons stated in the preamble, title 40, chapter I, part 63 of the Code of the Federal Regulations is amended as follows:

PART 63—[AMENDED]

1. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart WWWW—[Amended]

2. Section 63.5790 is amended by revising paragraph (c) to read as follows:

§ 63.5790 What parts of my plant does this subpart cover?

* * * * *

(c) The following operations are specifically excluded from any requirements in this subpart: application of mold sealing and release agents; mold stripping and cleaning; repair of parts that you did not manufacture, including non-routine manufacturing of parts; personal activities that are not part of the manufacturing operations (such as hobby shops on military bases); prepreg materials as defined in § 63.5935; non-gel coat surface coatings; application of putties, polyputties, and adhesives; repair or production materials that do not contain resin or gel coat; research and development operations as defined in section 112(c)(7) of the CAA; polymer casting; and closed molding operations (except for compression/injection molding). Note that the exclusion of certain operations from any requirements applies only to operations specifically listed in this paragraph. The requirements for any co-located operations still apply.

* * * * *

3. Section 63.5795 is revised to read as follows:

§ 63.5795 How do I know if my reinforced plastic composites production facility is a new affected source or an existing affected source?

(a) A reinforced plastic composites production facility is a new affected source if it meets all the criteria in paragraphs (a)(1) and (2) of this section.

(1) You commence construction of the source after August 2, 2001.

(2) You commence construction, and no other reinforced plastic composites production source exists at that site.

(b) For the purposes of this subpart, an existing affected source is any affected source that is not a new affected source.

4. Section 63.5799 is amended by:

a. Revising paragraph (a); and

b. Revising the paragraph (b) introductory text to read as follows:

§ 63.5799 How do I calculate my facility's organic HAP emissions on a tpy basis for purposes of determining which paragraphs of § 63.5805 apply?

* * * * *

(a) For new facilities prior to startup, calculate a weighted average organic HAP emissions factor for the operations specified in § 63.5805(c) and (d) on a lbs/ton of resin and gel coat basis. Base the weighted average on your projected operation for the 12 months subsequent to facility startup. Multiply the weighted average organic HAP emissions factor by projected resin use over the same period. You may calculate your organic HAP emissions factor based on the factors in Table 1 to this subpart, or you may use any HAP emissions factor approved by us, such as factors from the ''Compilation of Air Pollutant Emissions Factors, Volume I: Stationary Point and Area Sources (AP–42),'' or organic HAP emissions test data from similar facilities.

(b) For existing facilities and new facilities after startup, you may use the procedures in either paragraph (b)(1) or (2) of this section. If the emission factors for an existing facility have changed over the period of time prior to their initial compliance date due to incorporation of pollution-prevention control techniques, existing facilities may base the average emission factor on their operations as they exist on the compliance date. If an existing facility has accepted an enforceable permit limit that would result in less than 100 tpy of HAP measured prior to any add-on controls, and can demonstrate that they will operate at that level subsequent to the compliance date, they can be deemed to be below the 100 tpy threshold.

* * * * *

5. Section 63.5805 is revised to read as follows:

§ 63.5805 What standards must I meet to comply with this subpart?

You must meet the requirements of paragraphs (a) through (h) of this section

that apply to you. You may elect to comply using any options to meet the standards described in §§ 63.5810 through 63.5830. Use the procedures in § 63.5799 to determine if you meet or exceed the 100 tpy threshold.

(a) If you have an existing facility that has any centrifugal casting or continuous casting/lamination operations, you must meet the requirements of paragraph (a)(1) or (2) of this section:

(1) If the combination of all centrifugal casting and continuous lamination/casting operations emit 100 tpy or more of HAP, you must reduce the total organic HAP emissions from centrifugal casting and continuous lamination/casting operations by at least 95 percent by weight. As an alternative to meeting the 95 percent by weight requirement, centrifugal casting operations may meet the applicable organic HAP emissions limits in Table 5 to this subpart and continuous lamination/casting operations may meet an organic HAP emissions limit of 1.47 lbs/ton of neat resin plus and neat gel coat plus applied. For centrifugal casting, the percent reduction requirement does not apply to organic HAP emissions that occur during resin application onto an open centrifugal casting mold using open molding application techniques.

(2) If the combination of all centrifugal casting and continuous lamination/casting operations emit less than 100 tpy of HAP, then centrifugal casting and continuous lamination/casting operations must meet the appropriate requirements in Table 3 to this subpart.

(b) All operations at existing facilities not listed in paragraph (a) of this section must meet the organic HAP emissions limits in Table 3 to this subpart and the work practice standards in Table 4 to this subpart that apply, regardless of the quantity of HAP emitted.

(c) If you have a new facility that emits less than 100 tpy of HAP from the combination of all open molding, centrifugal casting, continuous lamination/casting, pultrusion, SMC manufacturing, mixing, and BMC manufacturing, you must meet the organic HAP emissions limits in Table 3 to this subpart and the work practice standards in Table 4 to this subpart that apply to you.

(d)(1) Except as provided in paragraph (d)(2) of this section, if you have a new facility that emits 100 tpy or more of HAP from the combination of all open molding, centrifugal casting, continuous lamination/casting, pultrusion, SMC manufacturing, mixing, and BMC manufacturing, you must reduce the total organic HAP emissions from these operations by at least 95 percent by weight and meet any applicable work practice standards in Table 4 to this subpart that apply to you. As an alternative to meeting 95 percent by weight, you may meet the organic HAP emissions limits in Table 5 to this subpart. If you have a continuous lamination/casting operation, that operation may alternatively meet an organic HAP emissions limit of 1.47 lbs/ton of neat resin plus and neat gel coat plus applied.

(2)(i) If your new facility manufactures large reinforced plastic composites parts using open molding or pultrusion operations, the specific open molding and pultrusion operations used to produce large parts are not required to reduce HAP emissions by 95 weight percent, but must meet the emission limits in Table 3 to this subpart.

(ii) A large open molding part is defined as a part that, when the final finished part is enclosed in the smallest rectangular six-sided box into which the part can fit, the total interior volume of the box exceeds 250 cubic feet, or any interior sides of the box exceed 50 square feet.

(iii) A large pultruded part is a part that exceeds an outside perimeter of 24 inches or has more than 350 reinforcements.

(e) If you have a new or existing facility subject to paragraph (a)(2) or (c) of this section at its initial compliance date that subsequently meets or exceeds the 100 tpy threshold in any calendar year, you must notify your permitting authority in your compliance report. You may at the same time request a one-time exemption from the requirements of paragraph (a)(1) or (d) of this section in your compliance report if you can demonstrate all of the following:

(1) The exceedance of the threshold was due to circumstances that will not be repeated.

(2) The average annual organic HAP emissions from the potentially affected operations for the last 3 years were below 100 tpy.

(3) Projected organic HAP emissions for the next calendar year are below 100 tpy, based on projected resin and gel coat use and the HAP emission factors calculated according to the procedures in § 63.5799.

(f) If you apply for an exemption in paragraph (e) of this section and subsequently exceed the HAP emission thresholds specified in paragraph (a)(2) or (c) of this section over the next 12-month period, you must notify the permitting authority in your semiannual report, the exemption is removed, and your facility must comply with paragraph (a)(1) or (d) of this section within 3 years from the time your organic HAP emissions first exceeded the threshold.

(g) If you have repair operations subject to this subpart as defined in § 63.5785, these repair operations must meet the requirements in Tables 3 and 4 to this subpart and are not required to meet the 95 percent organic HAP emissions reduction requirements in paragraph (a)(1) or (d) of this section.

(h) If you use an add-on control device to comply with this subpart, you must meet all requirements contained in 40 CFR part 63, subpart SS.

n 6. Section 63.5810 is revised to read as follows:

§ 63.5810 What are my options for meeting the standards for open molding and centrifugal casting operations at new and existing sources?

You must use one of the following methods in paragraphs (a) through (d) of this section to meet the standards for open molding or centrifugal casting operations in Table 3 or 5 to this subpart. You may use any control method that reduces organic HAP emissions, including reducing resin and gel coat organic HAP content, changing to nonatomized mechanical application, using covered curing techniques, and routing part or all of your emissions to an add-on control. You may use different compliance options for the different operations listed in Table 3 or 5 to this subpart. The necessary calculations must be completed within 30 days after the end of each month. You may switch between the compliance options in paragraphs (a) through (d) of this section. When you change to an option based on a 12-month rolling average, you must base the average on the previous 12 months of data calculated using the compliance option you are changing to, unless you were previously using an option that did not require you to maintain records of resin and gel coat use. In this case, you must immediately begin collecting resin and gel coat use data and demonstrate compliance 12 months after changing options.

(a) *Demonstrate that an individual resin or gel coat, as applied, meets the applicable emission limit in Table 3 or 5 to this subpart.* (1) Calculate your actual organic HAP emissions factor for each different process stream within each operation type. A process stream is defined as each individual combination of resin or gel coat, application technique, and control technique. Process streams within operations types are considered different from each other if any of the following four

characteristics vary: the neat resin plus or neat gel coat plus organic HAP content, the gel coat type, the application technique, or the control technique. You must calculate organic HAP emissions factors for each different process stream by using the appropriate equations in Table 1 to this subpart for open molding and for centrifugal casting, or site-specific organic HAP emissions factors discussed in § 63.5796. The emission factor calculation should include any and all emission reduction techniques used including any add-on controls. If you are using vapor suppressants to reduce HAP emissions, you must determine the vapor suppressant effectiveness (VSE) by conducting testing according to the procedures specified in appendix A to subpart WWWW of 40 CFR part 63. If you are using an add-on control device to reduce HAP emissions, you must determine the add-on control factor by conducting capture and control efficiency testing using the procedures specified in § 63.5850. The organic HAP emissions factor calculated from the equations in Table 1 to this subpart, or a site-specific emissions factor, is multiplied by the add-on control factor to calculate the organic HAP emissions factor after control. Use Equation 1 of this section to calculate the add-on control factor used in the organic HAP emissions factor equations.

$$\text{Add-on Control Factor} = 1 - \frac{\text{\% Control Efficiency}}{100} \qquad \text{(Eq. 1)}$$

Where:

Percent Control Efficiency=a value calculated from organic HAP emissions test measurements made according to the requirements of § 63.5850 to this subpart.

(2) If the calculated emission factor is less than or equal to the appropriate emission limit, you have demonstrated that this process stream complies with the emission limit in Table 3 to this subpart. It is not necessary that all your process streams, considered individually, demonstrate compliance to use this option for some process streams. However, for any individual resin or gel coat you use, if any of the process streams that include that resin or gel coat are to be used in any averaging calculations described in paragraphs (b) through (d) of this section, then all process streams using that individual resin or gel coat must be included in the averaging calculations.

(b) *Demonstrate that, on average, you meet the individual organic HAP emissions limits for each combination of operation type and resin application method or gel coat type.* Demonstrate that on average you meet the individual organic HAP emissions limits for each unique combination of operation type and resin application method or gel coat type shown in Table 3 to this subpart that applies to you.

(1)(i) Group the process streams described in paragraph (a) to this section by operation type and resin application method or gel coat type listed in Table 3 to this subpart and then calculate a weighted average emission factor based on the amounts of each individual resin or gel coat used for the last 12 months. To do this, sum the product of each individual organic HAP emissions factor calculated in paragraph (a)(1) of this section and the amount of neat resin plus and neat gel coat plus usage that corresponds to the individual factors and divide the numerator by the total amount of neat resin plus and neat gel coat plus used in that operation type as shown in Equation 2 of this section.

$$\text{Average organic HAP Emissions Factor} = \frac{\sum_{i=1}^{n} (\text{Actual Process Stream EF}_i * \text{Material}_i)}{\sum_{i=1}^{n} \text{Material}_i} \qquad \text{(Eq. 2)}$$

Where:

Actual Process Stream EF_i=actual organic HAP emissions factor for process stream i, lbs/ton;

$Material_i$=neat resin plus or neat gel coat plus used during the last 12 calendar months for process stream i, tons;

n=number of process streams where you calculated an organic HAP emissions factor.

(ii) You may, but are not required to, include process streams where you have demonstrated compliance as described in paragraph (a) of this section, subject to the limitations described in paragraph (a)(2) of this section, and you are not required to and should not include process streams for which you will demonstrate compliance using the procedures in paragraph (d) of this section.

(2) Compare each organic HAP emissions factor calculated in paragraph (b)(1) of this section with its corresponding organic HAP emissions limit in Table 3 or 5 to this subpart. If all emissions factors are equal to or less than their corresponding emission limits, then you are in compliance.

(c) *Demonstrate compliance with a weighted average emission limit.* Demonstrate each month that you meet each weighted average of the organic HAP emissions limits in Table 3 or 5 to this subpart that apply to you. When using this option, you must demonstrate compliance with the weighted average organic HAP emissions limit for all your open molding operations, and then separately demonstrate compliance with the weighted average organic HAP emissions limit for all your centrifugal casting operations. Open molding operations and centrifugal casting operations may not be averaged with each other.

(1) Each month calculate the weighted average organic HAP emissions limit for all open molding operations and the weighted average organic HAP emissions limit for all centrifugal casting operations for your facility for the last 12-month period to determine the organic HAP emissions limit you must meet. To do this, multiply the individual organic HAP emissions limits in Table 3 or 5 to this subpart for each open molding (centrifugal casting) operation type by the amount of neat resin plus or neat gel coat plus used in the last 12 months for each open molding (centrifugal casting) operation type, sum these results, and then divide this sum by the total amount of neat resin plus and neat gel coat plus used in open molding (centrifugal casting) over the last 12 months as shown in Equation 3 of this section.

$$\text{Weighted Average Emission Limit} = \frac{\sum_{i=1}^{n}(EL_i * Material_i)}{\sum_{i=1}^{n} Material_i} \quad \text{(Eq. 3)}$$

Where:
EL_i=organic HAP emissions limit for operation type i, lbs/ton from Tables 3 or 5 to this subpart;
$Material_i$=neat resin plus or neat gel coat plus used during the last 12-month period for operation type i, tons;
n=number of operations.

(2) Each month calculate your weighted average organic HAP emissions factor for open molding and centrifugal casting. To do this, multiply your actual open molding (centrifugal casting) operation organic HAP emissions factors calculated in paragraph (b)(1) of this section and the amount of neat resin plus and neat gel coat plus used in each open molding (centrifugal casting) operation type, sum the results, and divide this sum by the total amount of neat resin plus and neat gel coat plus used in open molding (centrifugal casting) operations as shown in Equation 4 of this section.

$$\text{Actual Weighted Average organic HAP Emissions Factor} = \frac{\sum_{i=1}^{n}(\text{Actual Operation } EF_i * Material_i)}{\sum_{i=1}^{n} Material_i} \quad \text{(Eq. 4)}$$

Where:
Actual Individual EF_i=Actual organic HAP emissions factor for operation type i, lbs/ton;
$Material_i$=neat resin plus or neat gel coat plus used during the last 12 calendar months for operation type i, tons;
n=number of operations.

(3) Compare the values calculated in paragraphs (c)(1) and (2) of this section. If each 12-month rolling average organic HAP emissions factor is less than or equal to the corresponding 12-month rolling average organic HAP emissions limit, then you are in compliance.

(d) *Meet the organic HAP emissions limit for one application method and use the same resin(s) for all application methods of that resin type.* This option is limited to resins of the same type. The resin types for which this option may be used are noncorrosion-resistant, corrosion-resistant and/or high strength, and tooling.

(1) For any combination of manual resin application, mechanical resin application, filament application, or centrifugal casting, you may elect to meet the organic HAP emissions limit for any one of these application methods and use the same resin in all of the resin application methods listed in this paragraph (d)(1). Table 7 to this subpart presents the possible combinations based on a facility selecting the application process that results in the highest allowable organic HAP content resin. If the resin organic HAP content is below the applicable value shown in Table 7 to this subpart, the resin is in compliance.

(2) You may also use a weighted average organic HAP content for each application method described in paragraph (d)(1) of this section. Calculate the weighted average organic HAP content monthly. Use Equation 2 in paragraph (b)(1) of this section except substitute organic HAP content for organic HAP emissions factor. You are in compliance if the weighted average organic HAP content based on the last 12 months of resin use is less than or equal to the applicable organic HAP contents in Table 7 to this subpart.

(3) You may simultaneously use the averaging provisions in paragraph (b) or (c) of this section to demonstrate compliance for any operations and/or resins you do not include in your compliance demonstrations in paragraphs (d)(1) and (2) of this section. However, any resins for which you claim compliance under the option in paragraphs (d)(1) and (2) of this section may not be included in any of the averaging calculations described in paragraph (b) or (c) of this section.

(4) You do not have to keep records of resin use for any of the individual resins where you demonstrate compliance under the option in paragraph (d)(1) of this section unless you elect to include that resin in the averaging calculations described in paragraph (d)(2) of this section.

n 7. Section 63.5830 is amended by:
n a. Revising paragraph (b)(4);
n b. Revising paragraph (c)(3); and
n c. Revising paragraph (e)(2) to read as follows.

§ 63.5830 What are my options for meeting the standards for pultrusion operations subject to the 60 weight percent organic HAP emissions reductions requirement?

* * * * *

(b) * * *

(4) For pultrusion lines with pre-wet area(s) prior to direct die injection, no more than 12.5 inches of open wet stock is permitted between the entrance of the first pre-wet area and the entrance to the die. If the pre-wet stock has any drip, it must be enclosed.

* * * * *

(c) * * *

(3) Resin drip is captured in a closed system and recycled back to the process.

* * * * *

(e) * * *

(2) The weighted average reduction based on resin throughput of all machines combined is 60 percent. For purposes of the average percent reduction calculation, wet area enclosures reduce organic HAP emissions by 60 percent, and direct die injection and preform injection reduce organic HAP emissions by 90 percent.

n 8. Section 63.5885 is revised to read as follows:

§ 63.5885 How do I calculate percent reduction to demonstrate compliance for continuous lamination/casting operations?

You may calculate percent reduction using any of the methods in paragraphs (a) through (d) of this section.

(a) *Compliant line option.* If all of your wet-out areas have PTE that meet the requirements of EPA Method 204 of appendix M of 40 CFR part 51, and all of your wet-out area organic HAP emissions and oven organic HAP emissions are vented to an add-on control device, use Equation 1 of this section to demonstrate compliance. In all other situations, use Equation 2 of this section to demonstrate compliance.

$$PR = \frac{(Inlet) - (Outlet)}{(Inlet)} \times 100 \qquad (Eq.\ 1)$$

Where:
PR=percent reduction;
Inlet+HAP emissions entering the control device, lbs per year;
Outlet=HAP emissions existing the control device to the atmosphere, lbs per year.

$$PR = \frac{(WAE_{ci} + O_{ci}) - (WAE_{co} + O_{co})}{(WAE_{ci} + WAE_{u} + O_{ci} + O_{u})} \times 100 \qquad (Eq.\ 2)$$

Where:
PR=percent reduction;
$WAEi_{ci}$=wet-out area organic HAP emissions, lbs per year, vented to a control device;
$WAEi_{u}$=wet-out area organic HAP emissions, lbs per year, not vented to a control device;
Oj_{u}=oven organic HAP emissions, lbs per year, not vented to a control device;
Oj_{ci}=oven organic HAP emissions, lbs per year, vented to a control device;
$WAEi_{co}$=wet-out area organic HAP emissions, lbs per year, from the control device outlet;
Oj_{co}=oven organic HAP emissions, lbs per year, from the control device outlet.

(b) *Averaging option.* Use Equation 3 of this section to calculate percent reduction.

$$PR = \frac{\left(\sum_{i=1}^{m} WAEi_{ci} + \sum_{j=1}^{n} Oj_{ci}\right) - \left(\sum_{i=1}^{m} WAEi_{co} + \sum_{j=1}^{n} Oj_{co}\right)}{\left(\sum_{i=1}^{m} WAEi_{ci} + \sum_{j=1}^{n} Oj_{ci} + \sum_{i=1}^{m} WAEi_{u} + \sum_{j=1}^{n} Oj_{u}\right)} \times 100 \qquad (Eq.\ 3)$$

Where:
PR=percent reduction;
$WAEi_{ci}$=wet-out area organic HAP emissions from wet-out area i, lbs per year, sent to a control device;
$WAEi_{u}$=wet-out area organic HAP emissions from wet-out area i, lbs per year, not sent to a control device;
$WAEi_{co}$=wet-out area organic HAP emissions from wet-out area i, lbs per year, at the outlet of a control device;
Oj_{u}=organic HAP emissions from oven j, lbs per year, not sent to a control device;
Oj_{ci}=organic HAP emissions from oven j, lbs per year, sent to a control device;
Oj_{co}=organic HAP emissions from oven j, lbs per year, at the outlet of the control device;
m=number of wet-out areas;
n=number of ovens.

(c) *Add-on control device option.* Use Equation 1 of this section to calculate percent reduction.

(d) *Combination option.* Use Equations 1 through 3 of this section, as applicable, to calculate percent reduction.

n 9. Section 63.5895 is amended by revising paragraph (d) to read as follows:

§ 63.5895 How do I monitor and collect data to demonstrate continuous compliance?

* * * * *

(d) Resin and gel coat use records are not required for the individual resins and gel coats that are demonstrated, as applied, to meet their applicable emission as defined in § 63.5810(a). However, you must retain the records of resin and gel coat organic HAP content, and you must include the list of these resins and gel coats and identify their application methods in your semiannual compliance reports. If after you have initially demonstrated that a specific combination of an individual resin or gel coat, application method, and controls meets its applicable emission limit, and the resin or gel coat changes or the organic HAP content increases, or you change the application method or controls, then you again must demonstrate that the individual resin or gel coat meets its emission limit as specified in paragraph (a) of § 63.5810. If any of the previously mentioned changes results in a situation where an individual resin or gel coat now exceeds its applicable emission limit in Table 3 or 5 of this subpart, you must begin collecting resin and gel coat use records and calculate compliance using one of the averaging options on a 12-month rolling average.

* * * * *

n 10. Section 63.5900 is amended by revising paragraphs (a)(2) and (3) to read as follows:

§ 63.5900 How do I demonstrate continuous compliance with the standards?

(a) * * *

(2) Compliance with organic HAP emissions limits is demonstrated by maintaining an organic HAP emissions factor value less than or equal to the appropriate organic HAP emissions limit listed in Table 3 or 5 to this subpart, on a 12-month rolling average, and/or by including in each compliance report a statement that individual resins and gel coats, as applied, meet the appropriate organic HAP emissions limits, as discussed in § 63.5895(d).

(3) Compliance with organic HAP content limits in Table 7 to this subpart is demonstrated by maintaining an average organic HAP content value less than or equal to the appropriate organic HAP contents listed in Table 7 to this subpart, on a 12-month rolling average, and/or by including in each compliance report a statement that resins and gel coats individually meet the appropriate organic HAP content limits in Table 7 to this subpart, as discussed in § 63.5895(d).

* * * * *

n 11. Section 63.5910 is amended by:

n a. Revising paragraph (f); and

n b. Adding paragraph (i) to read as follows.

§ 63.5910 What reports must I submit and when?

* * * * *

(f) You must report if you have exceeded the 100 tpy organic HAP emissions threshold if that exceedance would make your facility subject to § 63.5805(a)(1) or (d). Include with this report any request for an exemption under § 63.5805(e). If you receive an exemption under § 63.5805(e) and subsequently exceed the 100 tpy organic HAP emissions threshold, you must

report this exceedance as required in § 63.5805(f).

* * * * *

(i) Where multiple compliance options are available, you must state in your next compliance report if you have changed compliance options since your last compliance report.

n 12. Section 63.5915 is amended by revising paragraph (e) introductory text to read as follows:

§ 63.5915 What records must I keep?

* * * * *

(e) For a new or existing continuous lamination/ casting operation, you must keep the records listed in paragraphs (e)(1) through (4) of this section, when complying with the percent reduction and/or lbs/ton requirements specified in paragraphs (a) and (c) through (d) of § 63.5805.

* * * * *

n 13. Section 63.5935 is amended to revise the definitions of *High performance gel coat*, *Mixing*, *Neat resin plus*, and *Polymer casting* to read as follows:

§ 63.5935 What definitions apply to this subpart?

* * * * *

High Performance gel coat means a gel coat used on products for which National Sanitation Foundation, United States Department of Agriculture, ASTM, durability, or other property testing is required.

* * * * *

Mixing means the blending or agitation of any HAP-containing materials in vessels that are 5.00 gallons (18.9 liters) or larger, and includes the mixing of putties or polyputties. Mixing may involve the blending of resin, gel coat, filler, reinforcement, pigments, catalysts, monomers, and any other additives.

* * * * *

Neat resin plus means neat resin plus any organic HAP-containing materials that are added to the resin by the supplier or the facility. Neat resin plus does not include any added filler, reinforcements, catalysts, or promoters. Neat resin plus does include any additions of styrene or methyl methacrylate monomer in any form, including in catalysts and promoters.

* * * * *

Polymer casting means a process for fabricating composites in which composite materials are ejected from a casting machine or poured into an open, partially open, or closed mold and cured. After the composite materials are poured into the mold, they are not rolled out or worked while the mold is open, except for smoothing the material and/or vibrating the mold to remove bubbles. The composite materials may or may not include reinforcements. Products produced by the polymer casting process include cultured marble products and polymer concrete.

* * * * *

n 14. Table 1 to subpart WWWW of part 63 is revised to read as follows:

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Table 1 to Subpart WWWW of Part 63--Equations to Calculate Organic HAP Emissions Factors for Specific Open Molding and Centrifugal Casting Process Streams[1]

As specified in §63.5810, use the equations in the following table to calculate organic HAP emissions factors for specific open molding and centrifugal casting process streams:

If your operation type is a new or existing...	And you use...	With...	Use this organic HAP Emissions Factor (EF) Equation for materials with less than 33 percent organic HAP (19 percent organic HAP for nonatomized gel coat)[2,3,4] ...	Use this organic HAP emissions Factor (EF) Equation for materials with 33 percent or more organic HAP (19 percent for nonatomized gel coat)[2,3,4] ...
1. open molding operation	a. manual resin application	i. nonvapor-suppressed resin	EF = 0.126 x %HAP x 2000	EF = ((0.286 x %HAP)-0.0529) x 2000
		ii. vapor-suppressed resin	EF = 0.126 x %HAP x 2000 x (1-(0.5 x VSE factor))	EF = ((0.286 x %HAP)-0.0529) x 2000 x (1-(0.5 x VSE factor))
		iii. vacuum bagging/closed-mold curing with roll out	EF = 0.126 x %HAP x 2000 x 0.8	EF = ((0.286 x %HAP)-0.0529) x 2000 x 0.8
		iv. vacuum bagging/closed-mold curing without roll-out	EF = (0.126 x %HAP x 2000 x 0.5	EF = ((0.286 x %HAP)-0.0529) x 2000 x 0.5
	b. atomized mechanical resin application	i. nonvapor-suppressed resin	EF = 0.169 x %HAP x 2000	EF = ((0.714 x %HAP)-0.18) x 2000
		ii. vapor-suppressed resin	EF = 0.169 x %HAP x 2000 x (1-(0.45 x VSE factor))	EF = ((0.714 x %HAP)-0.18) x 2000 x (1-(0.45 x VSE factor))
		iii. vacuum bagging/closed-mold curing with roll-out	EF = 0.169 x %HAP x 2000 x 0.85	EF = ((0.714 x %HAP)-0.18) x 2000 x 0.85
		iv. vacuum bagging/closed-mold curing without roll-out	EF = 0.169 x %HAP x 2000 x 0.55	EF = ((0.714 x %HAP)-0.18) x 2000 x 0.55
	c. nonatomized mechanical resin application	i. nonvapor-suppressed resin	EF = 0.107 x %HAP x 2000	EF = ((0.157 x %HAP)-0.0165) x 2000
		ii. vapor-suppressed resin	EF = 0.107 x %HAP x 2000 x (1-(0.45 x VSE factor))	EF = ((0.157 x %HAP)-0.0165) x 2000 x (1-(0.45 x VSE factor))
		iii. closed-mold curing with roll-out	EF = 0.107 x %HAP x 2000 x 0.85	EF = ((0.157 x %HAP)-0.0165) x 2000 x 0.85
		iv. vacuum bagging/closed-mold curing without roll-out	EF = 0.107 x %HAP x 2000 x 0.55	EF = ((0.157 x %HAP)-0.0165) x 2000 x 0.55
	d. atomized mechanical resin application with robotic or automated spray control[5]	nonvapor-suppressed resin	EF = 0.169 x %HAP x 2000 x 0.77	EF = 0.77 x ((0.714 x %HAP)-0.18) x 2000
	e. filament application[6]	i. nonvapor-suppressed resin	EF = 0.184 x %HAP x 2000	EF = ((0.2746 x %HAP)-0.0298) x 2000
		ii. vapor-suppressed resin	EF = 0.12 x %HAP x 2000	EF = ((0.2746 x %HAP)-0.0298) x 2000 x 0.65
	f. atomized spray gel coat application	nonvapor-suppressed gel coat	EF = 0.445 x %HAP x 2000	EF = ((1.03646 x %HAP)-0.195) x 2000

	g. nonatomized spray gel coat application	nonvapor-suppressed gel coat	EF = 0.185 x %HAP x 2000	EF = ((0.4506 x %HAP)-0.0505) x 2000
	h. atomized spray gel coat application using robotic or automated spray	nonvapor-suppressed gel coat	EF = 0.445 x %HAP x 2000 x 0.73	EF = ((1.03646 x %HAP)-0.195) x 2000 x 0.73
2. centrifugal casting operations [7][8]	a. heated air blown through molds	nonvapor-suppressed resin	EF = 0.558 x (%HAP) x 2000	EF = 0.558 x (%HAP) x 2000
	b. vented molds, but air vented through the molds is not heated	nonvapor-suppressed resin	EF = 0.026 x (%HAP) x 2000	EF = 0.026 x (%HAP) x 2000

Footnotes to Table 1

[1] The equations in this table are intended for use in calculating emission factors to demonstrate compliance with the emission limits in subpart WWWW. These equations may not be the most appropriate method to calculate emission estimates for other purposes. However, this does not preclude a facility from using the equations in this table to calculate emission factors for purposes other then rule compliance if these equations are the most accurate available.

[2] To obtain the organic HAP emissions factor value for an operation with an add-on control device multiply the EF above by the add-on control factor calculated using Equation 1 of §63.5810. The organic HAP emissions factors have units of lbs of organic HAP per ton of resin or gel coat applied.

[3] Percent HAP means total weight percent of organic HAP (styrene, methyl methacrylate, and any other organic HAP) in the resin or gel coat prior to the addition of fillers, catalyst, and promoters. Input the percent HAP as a decimal, i.e., 33 percent HAP should be input as 0.33, not 33.

[4] The VSE factor means the percent reduction in organic HAP emissions expressed as a decimal measured by the VSE test method of appendix A to this subpart.

[5] This equation is based on a organic HAP emissions factor equation developed for mechanical atomized controlled spray. It may only be used for automated or robotic spray systems with atomized spray. All spray operations using hand held spray guns must use the appropriate mechanical atomized or mechanical nonatomized organic HAP emissions factor equation. Automated or robotic spray systems using nonatomized spray should use the appropriate nonatomized mechanical resin application equation.

[6] Applies only to filament application using an open resin bath. If resin is applied manually or with a spray gun, use the appropriate manual or mechanical application organic HAP emissions factor equation.

[7] These equations are for centrifugal casting operations where the mold is vented during spinning. Centrifugal casting operations where the mold is completely sealed after resin injection are considered to be closed molding operations.

[8] If a centrifugal casting operation uses mechanical or manual resin application techniques to apply resin to an open centrifugal casting mold, use the appropriate open molding equation with covered cure and no rollout to determine an emission factor for operations prior to the closing of the centrifugal casting mold. If the closed centrifugal casting mold is vented during spinning, use the appropriate centrifugal casting equation to calculate an emission factor for the portion of the process where spinning and cure occur. If a centrifugal casting operation uses mechanical or manual resin application techniques to apply resin to an open centrifugal casting mold, and the mold is then closed and is not vented, treat the entire operation as open molding with covered cure and no rollout to determine emission factors.

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n 15. Table 3 to subpart WWWW of part 63 is revised to read as follows:

As specified in § 63.5805, you must meet the following organic HAP emissions limits that apply to you:

TABLE 3 TO SUBPART WWWW OF PART 63.—ORGANIC HAP EMISSIONS LIMITS FOR SPECIFIC OPEN MOLDING, CENTRIFUGAL CASTING, PULTRUSION AND CONTINUOUS LAMINATION/CASTING OPERATIONS

If your operation type is . . .	And you use . . .	[1] Your organic HAP emissions limit is . . .
1. open molding—corrosion-resistant and/or high strength (CR/HS).	a. mechanical resin application b. filament application c. manual resin application	113 lb/ton. 171 lb/ton. 123 lb/ton.
2. open molding—non-CR/HS	a. mechanical resin application b. filament application c. manual resin application	88 lb/ton. 188 lb/ton. 87 lb/ton.
3. open molding—tooling	a. mechanical resin application b. manual resin application	254 lb/ton. 157 lb/ton.
4. open molding—low-flame spread/low-smoke products.	a. mechanical resin application b. filament application c. manual resin application	497 lb/ton. 270 lb/ton. 238 lb/ton.
5. open molding—shrinkage controlled resins [2]	a. mechanical resin application b. filament application c. manual resin application	354 lb/ton. 215 lb/ton. 180 lb/ton.
6. open molding—gel coat [3]	a. tooling gel coating b. white/off white pigmented gel coating c. all other pigmented gel coating d. CR/HS or high performance gel coat e. fire retardant gel coat f. clear production gel coat	440 lb/ton. 267 lb/ton. 377 lb/ton. 605 lb/ton. 854 lb/ton. 522 lb/ton.
7. centrifugal casting—CR/HS	a. resin application with the mold closed, and the mold is vented during spinning and cure. b. resin application with the mold closed, and the mold is not vented during spinning and cure. c. resin application with the mold open, and the mold is vented during spinning and cure. d. resin application with the mold open, and the mold is not vented during spinning and cure.	25 lb/ton.[4] NA—this is considered to be a closed molding operation. 25 lb/ton.[4] Use the appropriate open molding emission limit.[5]
8. centrifugal casting—non-CR/HS	a. resin application with the mold closed, and the mold is vented during spinning and cure. b. resin application with the mold closed, and mold is not vented during the spinning and cure. c. resin application with the mold open, and the mold is vented during spinning and cure. d. resin application with the mold open, and the mold is not vented during spinning and cure.	20 lb/ton.[4] NA—this is considered to be a closed molding operation. 20 lb/ton.[4] Use the appropriate open molding emission limit.[5]
9. pultrusion [6]	N/A	reduce total organic HAP emissions by at least 60 weight percent.
10. continuous lamination/casting	N/A	reduce total organic HAP emissions by at least 58.5 weight percent or not exceed a organic HAP emissions limit of 15.7 lbs of organic HAP per ton of neat resin plus and neat gel coat plus.

[1] Organic HAP emissions limits for open molding and centrifugal casting are expressed as lb/ton. You must be at or below these values based on a 12-month rolling average.

[2] This emission limit applies regardless of whether the shrinkage controlled resin is used as a production resin or a tooling resin.

[3] If you only apply gel coat with manual application, for compliance purposes treat the gel coat as if it were applied using atomized spray guns to determine both emission limits and emission factors. If you use multiple application methods and any portion of a specific gel coat is applied using nonatomized spray, you may use the nonatomized spray gel coat equation to calculate an emission factor for the manually applied portion of that gel coat. Otherwise, use the atomized spray gel coat application equation to calculate emission factors.

[4] For compliance purposes, calculate your emission factor using only the appropriate centrifugal casting equation in item 2 of Table 1 to this subpart, or a site specific emission factor for after the mold is closed as discussed in § 63.5796.

[5] Calculate your emission factor using the appropriate open molding covered cure emission factor in item 1 of Table 1 to this subpart, or a site specific emission factor as discussed in § 63.5796.

[6] Pultrusion machines that produce parts that meet the following criteria: 1,000 or more reinforcements or the glass equivalent of 1,000 ends of 113 yield roving or more; and have a cross sectional area of 60 square inches or more are not subject to this requirement. Their requirement is the work practice of air flow management which is described in Table 4 to this subpart.

n 16. Table 4 to subpart WWWW of part 63 is revised to read as follows:

As specified in § 63.5805, you must meet the work practice standards in the following table that apply to you:

TABLE 4 TO SUBPART WWWW OF PART 63.—WORK PRACTICE STANDARDS

For . . .	You must . . .
1. a new or existing closed molding operation using compression/injection molding.	uncover, unwrap or expose only one charge per mold cycle per compression/injection molding machine. For machines with multiple molds, one charge means sufficient material to fill all molds for one cycle. For machines with robotic loaders, no more than one charge may be exposed prior to the loader. For machines fed by hoppers, sufficient material may be uncovered to fill the hopper. Hoppers must be closed when not adding materials. Materials may be uncovered to feed to slitting machines. Materials must be recovered after slitting.
2. a new or existing cleaning operation	not use cleaning solvents that contain HAP, except that styrene may be used as a cleaner in closed systems, and organic HAP containing cleaners may be used to clean cured resin from application equipment. Application equipment includes any equipment that directly contacts resin.
3. a new or existing materials HAP-containing materials storage operation.	keep containers that store HAP-containing materials closed or covered except during the addition or removal of materials. Bulk HAP-containing materials storage tanks may be vented as necessary for safety.
4. an existing or new SMC manufacturing operation	close or cover the resin delivery system to the doctor box on each SMC manufacturing machine. The doctor box itself may be open.
5. an existing or new SMC manufacturing operation	use a nylon containing film to enclose SMC.
6. all mixing or BMC manufacturing operations[1]	use mixer covers with no visible gaps present in the mixer covers, except that gaps of up to 1 inch are permissible around mixer shafts and any required instrumentation.
7. all mixing or BMC manufacturing operations[1]	close any mixer vents when actual mixing is occurring, except that venting is allowed during addition of materials, or as necessary prior to adding materials or opening the cover for safety. Vents routed to a 95 percent efficient control device are exempt from this requirement.
8. all mixing or BMC manufacturing operations[1]	keep the mixer covers closed while actual mixing is occurring except when adding materials or changing covers to the mixing vessels.
9. a new or existing pultrusion operation manufacturing parts that meet the following criteria: 1,000 or more reinforcements or the glass equivalent of 1,000 ends of 113 yield roving or more; and have a cross sectional area of 60 square inches or more that is not subject to the 95 percent organic HAP emission reduction requirement.	i. not allow vents from the building ventilation system, or local or portable fans to blow directly on or across the wet-out area(s), ii. not permit point suction of ambient air in the wet-out area(s) unless that air is directed to a control device, iii. use devices such as deflectors, baffles, and curtains when practical to reduce air flow velocity across the wet-out area(s), iv. direct any compressed air exhausts away from resin and wet-out area(s), v. convey resin collected from drip-off pans or other devices to reservoirs, tanks, or sumps via covered troughs, pipes, or other covered conveyance that shields the resin from the ambient air, vi. cover all reservoirs, tanks, sumps, or HAP-containing materials storage vessels except when they are being charged or filled, and vii. cover or shield from ambient air resin delivery systems to the wet-out area(s) from reservoirs, tanks, or sumps where practical.

[1] Containers of 5 gallons or less may be open when active mixing is taking place, or during periods when they are in process (i.e., they are actively being used to apply resin). For polymer casting mixing operations, containers with a surface area of 500 square inches or less may be open while active mixing is taking place.

n 17. The title and introductory text to Table 5 to subpart WWWW of part 63 are revised to read as follows:

Table 5 to Subpart WWW of Part 63.—Alternative Organic HAP Emissions Limits for Open Molding, Centrifugal Casting, and SMC Manufacturing Operations Where the Standards are Based on a 95 Percent Reduction Requirement

As specified in § 63.5805, as an alternative to the 95 percent organic HAP emissions reductions requirement, you may meet the appropriate organic HAP emissions limits in the following table:

* * * * *

n 18. Table 7 to subpart WWWW of part 63 is revised to read as follows:

As specified in § 63.5810(d), when electing to use the same resin(s) for multiple resin application methods, you may use any resin(s) with an organic HAP content less than or equal to the values shown in the following table, or any combination of resins whose weighted average organic HAP content based on a 12-month rolling average is less than or equal to the values shown the following table:

TABLE 7—TO SUBPART WWWW OF PART 63.—OPTIONS ALLOWING USE OF THE SAME RESIN ACROSS DIFFERENT OPERATIONS THAT USE THE SAME RESIN TYPE

If your facility has the following resin type and application method . . .	The highest resin weight is* * * percent organic HAP content, or weighted average weight percent organic HAP content, you can use for . . .	is . . .
1. CR/HS resins, centrifugal casting [1] [2]	a. CR/HS mechanical	[3] 48.0
	b. CR/HS filament application	48.0
	c. CR/HS manual	48.0
2. CR/HS resins, nonatomized mechanical	a. CR/HS filament application	46.4
	b. CR/HS manual	46.4
3. CR/HS resins, filament application	CR/HS manual	42.0
4. non-CR/HS resins, filament application	a. non-CR/HS mechanical	[3] 45.0
	b. non-CR/HS manual	45.0
	c. non-CR/HS centrifugal casting [1] [2]	45.0
5. non-CR/HS resins, nonatomized mechanical	a. non-CR/HS manual	38.5
	b. non-CR/HS centrifugal casting [1] [2]	38.5
6. non-CR/HS resins, centrifugal casting [1] [2]	non-CR/HS manual	37.5
7. tooling resins, nonatomized mechanical	tooling manual	91.4
8. tooling resins, manual	tooling atomized mechanical	45.9

[1] If the centrifugal casting operation blows heated air through the molds, then 95 percent capture and control must be used if the facility wishes to use this compliance option.

[2] If the centrifugal casting molds are not vented, the facility may treat the centrifugal casting operations as if they were vented if they wish to use this compliance option.

[3] Nonatomized mechanical application must be used.

n 19. Table 8 to subpart WWWW of part 63 is revised to read as follows: As specified in § 63.5860(a), you must demonstrate initial compliance with organic HAP emissions limits as specified in the following table:

TABLE 8 TO SUBPART WWWW OF PART 63.—INITIAL COMPLIANCE WITH ORGANIC HAP EMISSIONS LIMITS

For . . .	That must meet the following organic HAP emissions limit . . .	You have demonstrated initial compliance if . . .
1. open molding and centrifugal casting operations.	a. an organic HAP emissions limit shown in Tables 3 or 5 to this subpart, or an organic HAP content limit shown in Table 7 to this subpart.	i. you have met the appropriate organic HAP emissions limits for these operations as calculated using the procedures in § 63.5810 on a 12-month rolling average 1 year after the appropriate compliance date, and/or ii. you demonstrate that any individual resins or gel coats not included in (i) above, as applied, meet their applicable emission limits, or iii. you demonstrate using the appropriate values in Table 7 to this subpart that the weighted average of all resins and gel coats for each resin type and application method meet the appropriate organic HAP contents.
2. open molding centrifugal casting, continuous lamination/casting, SMC and BMC manufacturing, and mixing operations.	a. reduce total organic HAP emissions by at least 95 percent by weight.	total organic HAP emissions, based on the results of the capture efficiency and destruction efficiency testing specified in Table 6 to this subpart, are reduced by at least 95 percent by weight.
3. continuous lamination/casting operations	a. reduce total organic HAP emissions, by at least 58.5 weight percent, or	total organic HAP emissions, based on the results of the capture efficiency and destruction efficiency in Table 6 to this subpart and the calculation procedures specified in §§ 63.5865 through 63.5890, are reduced by at least 58.5 percent by weight.
	b. not exceed an organic HAP emissions limit of 15.7 lbs of organic HAP per ton of neat resin plus and neat gel coat plus.	total organic HAP emissions, based on the results of the capture efficiency and destruction efficiency testing specified in Table 6 to this subpart and the calculation procedures specified in §§ 63.5865 through 63.5890, do not exceed 15.7 lbs of organic HAP per ton of neat resin plus and neat gel coat plus.

TABLE 8 TO SUBPART WWWW OF PART 63.—INITIAL COMPLIANCE WITH ORGANIC HAP EMISSIONS LIMITS—Continued

For . . .	That must meet the following organic HAP emissions limit . . .	You have demonstrated initial compliance if . . .
4. continuous lamination/casting operations	a. reduce total organic HAP emissions by at least 95 weight percent or	total organic HAP emissions, based on the results of the capture efficiency and destruction efficiency testing specified in Table 6 to this subpart and the calculation procedures specified in §§ 63.5865 through 63.5890, are reduced by at least 95 percent by weight
	b. not exceed an organic HAP emissions limit of 1.47 lbs of organic HAP per ton of neat resin plus and neat gel coat plus.	total organic HAP emissions, based on the results of the capture efficiency and destruction efficiency testing specified in Table 6 and the calculation procedures specified in §§ 63.5865 through 63.5890, do not exceed 1.47 lbs of organic HAP of per ton of neat resin plus and neat gel coat plus.
5. pultrusion operations	a. reduce total organic HAP emissions by at least 60 percent by weight.	i. total organic HAP emissions, based on the results of the capture efficiency and add-on control device destruction efficiency testing specified in Table 6 to this subpart, are reduced by at least 60 percent by weight, and/or ii. as part of the notification of initial compliance status, the owner/operator submits a certified statement that all pultrusion lines not controlled with an add-on control device, but for which an emission reduction is being claimed, are using direct die injection, and/or wet-area enclosures that meet the criteria of § 63.5830.
6. pultrusion operations	a. reduce total organic HAP emissions by at least 95 percent by weight.	i. total organic HAP emissions, based on the results of the capture efficiency and add-on control device destruction efficiency testing specified in Table 6 to this subpart, are reduced by at least 95 percent by weight.

n 20. Table 9 to subpart WWWW of part 63 is revised to read as follows:

As specified in § 63.5860(a), you must demonstrate initial compliance with work practice standards as specified in the following table:

TABLE 9 TO SUBPART WWWW OF PART 63.—INITIAL COMPLIANCE WITH WORK PRACTICE STANDARDS

For . . .	That must meet the following standards . . .	You have demonstrated initial compliance if . . .
1. a new or existing closed molding operation using compression/injection molding.	uncover, unwrap or expose only one charge per mold cycle per compression/injection molding machine. For machines with multiple molds, one charge means sufficient material to fill all molds for one cycle. For machines with robotic loaders, no more than one charge may be exposed prior to the loader. For machines fed by hoppers, sufficient material may be uncovered to fill the hopper. Hoppers must be closed when not adding materials. Materials may be uncovered to feed to slitting machines. Materials must be recovered after slitting.	the owner or operator submits a certified statement in the notice of compliance status that only one charge is uncovered, unwrapped, or exposed per mold cycle per compression/injection molding machine, or prior to the loader, hoppers are closed except when adding materials, and materials are recovered after slitting.
2. a new or existing cleaning operation	not use cleaning solvents that contain HAP, except that styrene may be used in closed systems, and organic HAP containing materials may be used to clean cured resin from application equipment. Application equipment includes any equipment that directly contacts resin between storage and applying resin to the mold or reinforcement.	the owner or operator submits a certified statement in the notice of compliance status that all cleaning materials, except styrene contained in closed systems, or materials used to clean cured resin from application equipment, contain no HAP.

TABLE 9 TO SUBPART WWWW OF PART 63.—INITIAL COMPLIANCE WITH WORK PRACTICE STANDARDS—Continued

For . . .	That must meet the following standards . . .	You have demonstrated initial compliance if . . .
3. a new or existing materials HAP-containing materials storage operation.	keep containers that store HAP-containing materials closed or covered except during the addition or removal of materials. Bulk HAP-containing materials storage tanks may be vented as necessary for safety.	the owner or operator submits a certified statement in the notice of compliance status that all HAP-containing storage containers are kept closed or covered except when adding or removing materials, and that any bulk storage tanks are vented only as necessary for safety.
4. an existing or new SMC manufacturing operation.	close or cover the resin delivery system to the doctor box on each SMC manufacturing machine. The doctor box itself may be open.	the owner or operator submits a certified statement in the notice of compliance status that the resin delivery system is closed or covered.
5. an existing or new SMC manufacturing operation.	use a nylon containing film to enclose SMC ...	the owner or operator submits a certified statement in the notice of compliance status that a nylon-containing film is used to enclose SMC.
6. an existing or new mixing or BMC manufacturing operation.	use mixer covers with no visible gaps present in the mixer covers, except that gaps of up to 1 inch are permissible around mixer shafts and any required instrumentation.	the owner or operator submits a certified statement in the notice of compliance status that mixer covers are closed during mixing except when adding materials to the mixers, and that gaps around mixer shafts and required instrumentation are less than 1 inch.
7. an existing mixing or BMC manufacturing operation.	not actively vent mixers to the atmosphere while the mixing agitator is turning, except that venting is allowed during addition of materials, or as necessary prior to adding materials for safety.	the owner or operator submits a certified statement in the notice of compliance status that mixers are not actively vented to the atmosphere when the agitator is turning except when adding materials or as necessary for safety.
8. a new or existing mixing or BMC manufacturing operation.	keep the mixer covers closed during mixing except when adding materials to the mixing vessels.	the owner or operator submits a certified statement in the notice of compliance status that mixers closed except when adding materials to the mixing vessels.
9. a new or existing pultrusion operation manufacturing parts that meet the following criteria: 1,000 or more reinforcements or the glass equivalent of 1,000 ends of 113 yield roving or more; and have a cross sectional area of 60 square inches or more that is not subject to the 95 percent organic HAP emission reduction requirement.	i. Not allow vents from the building ventilation system, or local or portable fans to blow directly on or across the wet-out area(s), ii. not permit point suction of ambient air in the wet-out area(s) unless that air is directed to a control device, iii. use devices such as deflectors, baffles, and curtains when practical to reduce air flow velocity across the wet-out area(s), iv. direct any compressed air exhausts away from resin and wet-out area(s), v. convey resin collected from drip-off pans or other devices to reservoirs, tanks, or sumps via covered troughs, pipes, or other covered conveyance that shields the resin from the ambient air, vi. clover all reservoirs, tanks, sumps, or HAP-containing materials storage vessels except when they are being charged or filled, and vii. cover or shield from ambient air resin delivery systems to the wet-out area(s) from reservoirs, tanks, or sumps where practical.	the owner or operator submits a certified statement in the notice of compliance status that they have complied with all the requirements listed in 9.i through 9.vii.

[FR Doc. 05–16701 Filed 8–24–05; 8:45 am]
BILLING CODE 6560–50–P

Federal Register

Thursday,
August 25, 2005

Part VI

Department of Housing and Urban Development

Proposed Fair Market Rents for Fiscal Year 2006 for Housing Choice Voucher, Moderate Rehabilitation Single Room Occupancy and Certain Other HUD Programs; Supplemental Notice on 50th Percentile Designation; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4995–N–02; HUD–2005–0017]

Proposed Fair Market Rents for Fiscal Year 2006 for Housing Choice Voucher, Moderate Rehabilitation Single Room Occupancy and Certain Other HUD Programs; Supplemental Notice on 50th Percentile Designation

AGENCY: Office of the Secretary, HUD.

ACTION: Notice.

SUMMARY: Section 8(c)(1) of the United States Housing Act of 1937 (USHA) requires the Secretary to publish FMRs periodically, but not less than annually, to be effective on October 1 of each year. On June 2, 2005, HUD published a notice on proposed fair market rents (FMRs) for Fiscal Year (FY) 2006. In the June 2, 2005, notice, HUD advised that it would also publish a separate notice to identify any areas that may be newly eligible for 50th percentile FMRs as well as any areas that remain eligible or that are no longer eligible for 50th percentile FMRs, as provided in HUD's regulations. This notice provides this information. It identifies 24 areas eligible for 50th percentile FMRs, which consists of areas that remain eligible for 50th percentile FMRs plus areas that are newly eligible.

DATES: *Comments Due Date:* September 26, 2005.

ADDRESSES: Interested persons are invited to submit comments regarding HUD's estimates of the FMRs, as published in this notice, to the Office of the General Counsel, Rules Docket Clerk, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0001. Communications should refer to the above docket number and title and should contain the information specified in the ''Request for Comments'' section. To ensure that the information is fully considered by all of the reviewers, each commenter is requested to submit two copies of its comments, one to the Rules Docket Clerk and the other to the Economic and Market Analysis Staff in the appropriate HUD field office. A copy of each communication submitted will be available for public inspection and copying during regular business hours (8 a.m. to 5 p.m. Eastern Time) at the above address.

FOR FURTHER INFORMATION CONTACT: For technical information on the methodology used to develop FMRs or a listing of all FMRs, please call the HUD USER information line at 800–245–2691 or access the information on the HUD Web site at *http://www.huduser.org/datasets/fmr.html.* FMRs are listed at the 40th or 50th percentile in Schedule B of this notice. For informational purposes, a table of 40th percentile recent mover rents for the areas with 50th percentile FMRs will be provided on the same Web site noted above. Any questions related to use of FMRs or voucher payment standards should be directed to the respective local HUD program staff. Questions on how to conduct FMR surveys or further methodological explanations may be addressed to Marie L. Lihn or Lynn A. Rodgers, Economic and Market Analysis Division, Office of Economic Affairs, Office of Policy Development and Research, telephone (202) 708–0590. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339. (Other than the HUD USER information line and TTY numbers, telephone numbers are not toll free.) *Electronic Data Availability:* This **Federal Register** notice is available electronically from the HUD news page: *http://www.hudclips.org.* **Federal Register** notices also are available electronically from the U.S. Government Printing Office Web site at *http://www.gpoaccess.gov/fr/index.html.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 8 of the USHA (42 U.S.C. 1437f) authorizes housing assistance to aid lower income families in renting safe and decent housing. Housing assistance payments are limited by FMRs established by HUD for different areas. In the Housing Choice Voucher program, the FMR is the basis for determining the ''payment standard amount'' used to calculate the maximum monthly subsidy for an assisted family (see 24 CFR 982.503). In general, the FMR for an area is the amount that would be needed to pay the gross rent (shelter rent plus utilities) of privately owned, decent, and safe rental housing of a modest (non-luxury) nature with suitable amenities. In addition, all rents subsidized under the Housing Choice Voucher program must meet reasonable rent standards. The interim rule published on October 2, 2000 (65 FR 58870), established 50th percentile FMRs for certain areas.

Section 8(c) of the USHA requires the Secretary of HUD to publish FMRs periodically, but not less frequently than annually. HUD's regulations implementing section 8(c), codified at 24 CFR part 888, provide that HUD will develop proposed FMRs, publish them for public comment, provide a public comment period of at least 30 days, analyze the comments, and publish final FMRs. (See 24 CFR 888.115.) HUD published its notice on proposed FY2006 FMRs on June 2, 2005 (70 FR 32402), and provided a 60-day public comment period. In the June 2, 2005, notice, HUD advised that it would publish a separate notice to identify any areas that may be newly eligible for 50th percentile FMRs as well as any areas that remain eligible or no longer remain eligible for 50th percentile FMRs, as provided in HUD's regulations.

Fiftieth percentile FMRs were establish by a rule published on October 2, 2000 (65 FR 58870), that also established the eligibility criteria used to select areas that would be assigned 50th rather than the normal 40th percentile FMRs. The objective was to give PHAs a tool to assist them in de-concentrating voucher program use patterns. The preamble to the October 2, 2000, rule noted that a PHA for which 50th percentile FMRs were provided could advise HUD that its jurisdiction does not require the higher payment standards based on the 50th percentile and obtain HUD approval to continue or establish payment standards below 90 percent of the 50th percentile. (See 65 FR 58871). The three criteria for 50th percentile FMRs are:

The three FMR area eligibility criteria were:

1. *FMR Area Size:* the FMR area had to have at least 100 census tracts.

2. *Concentration of Affordable Units:* 70 percent or fewer of the tracts with at least 10 two-bedroom units had at least 30 percent of these units with gross rents at or below the 40th percentile two-bedroom FMR; and,

3. *Concentration of Participants:* 25 percent or more of the tenant-based rental program participants in the FMR area resided in the 5 percent of census tracts with the largest number of program participants.

The rule also specified that areas assigned 50th percentile FMRs were to be re-evaluated after three years, and that the 50th percentile rents would be rescinded unless an area has made at least a fraction of a percent progress in reducing concentration and otherwise remains eligible. (See 24 CFR 888.113.) As noted in the June 2, 2005, notice, the three-year period for the first areas determined eligible to receive the 50th percentile FMRs, following promulgation of the regulation in § 888.113, has come to a close.

II. 50th Percentile FMR Areas for FY2006

Based on its assessment, HUD has determined that only 14 of the 48 areas assigned 50th percentile FMRs in the June 2, 2005, notice shall continue to be assigned 50th percentile FMRs. Only these 14 areas met the regulatory requirements for continued eligibility. In addition to these 14 areas that continue to remain eligible for 50th percentile FMRs, HUD identified 10 areas currently assigned 40th percentile FMRs that are eligible for 50th percentile FMRs. These 24 areas are as follows (note that the acronym MSA refers to metropolitan statistical area, and HMFA refers to HUD Metro FMR area as defined in the June 2, 2005, notice):

Albuquerque, NM MSA.
Austin-Round Rock, TX MSA.
Baltimore-Towson, MD MSA.
Chicago-Naperville-Joliet, IL HMFA.
Denver-Aurora, CO MSA.
Fort Worth-Arlington, TX HMFA.
Grand Rapids-Wyoming, MI HMFA.
Hartford-West Hartford-East Hartford, CT HMFA.
Honolulu, HI MSA.
Houston-Baytown-Sugar Land, TX HMFA.
Kansas City, MO-KS HMFA.
Las Vegas-Paradise, NV MSA.
Milwaukee-Waukesha-West Allis, WI MSA.
New Haven-Meriden, CT HMFA.
Orange County, CA HMFA.
Phoenix-Mesa-Scottsdale, AZ MSA.
Providence-Fall River, RI-MA HMFA.
Richmond, VA HMFA.
Riverside-San Bernardino-Ontario, CA MSA.
Sarasota-Bradenton-Venice, FL MSA.
Tacoma, WA HMFA.
Tucson, AZ MSA.
Virginia Beach-Norfolk-Newport News, VA-NC MSA.
Washington-Arlington-Alexandria, DC-VA-MD HMFA.

The following section provides the analysis undertaken by HUD to determine 50th percentile eligibility and 50th percentile continued eligibility.

III. Procedures for Determining 50th Percentile FMRs

This section describes the procedure HUD followed in evaluating which new and currently designated areas are eligible for 50th percentile FMRs under HUD's regulations in 24 CFR part 888. Additionally, in accordance with HUD's Information Quality Guidelines (published at 67 FR 69642), certain FMR areas were deemed ineligible for 50th percentile FMRs because the information on concentration of voucher program participants needed to make the eligibility determination was of inadequate quality as described in this section. Table 1 lists the 48 FMR areas that were assigned proposed FY2006 FMRs set at the 50th percentile based on new FMR area definitions. Table 1 includes the 39 areas originally determined eligible for 50th percentile FMRs (following the October 2000 final rule that allowed 50th percentile FMRs) plus subparts of these areas that were separated from the original areas in accordance with the new Office of Management and Budget (OMB) metropolitan area definitions. Those areas marked by an asterisk (*) in Table 1 failed to meet one or more eligibility criteria as described below, including measurable deconcentration. Those areas marked by a plus sign (+) in Table 1 had insufficient information, as described below, upon which to determine concentration of voucher program participants and are deemed ineligible for 50th percentile FMRs. Only 14 of these areas met all of the eligibility criteria including information quality requirements and had measurable deconcentration.

TABLE 1.—PROPOSED FY2006 50TH PERCENTILE FMR AREAS LISTED IN JUNE 2, 2005, NOTICE

Albuquerque, NM MSA
*Allegan County, MI
*Ashtabula County, OH
*Atlanta-Sandy Springs-Marietta, GA HMFA
Austin-Round Rock, TX MSA
*Baton Rouge, LA HMFA
*Bergen-Passaic, NJ HMFA
*Buffalo-Niagara Falls, NY MSA
Chicago-Naperville-Joliet, IL HMFA
*Cleveland-Elyria-Mentor, OH MSA
+Dallas, TX HMFA
Denver-Aurora, CO MSA
*Detroit-Warren-Livonia, MI HMFA
Fort Worth-Arlington, TX HMFA
Grand Rapids-Wyoming, MI HMFA
*Holland-Grand Haven, MI MSA
*Hood County, TX
Houston-Baytown-Sugar Land, TX HMFA
Kansas City, MO-KS HMFA
Las Vegas-Paradise, NV MSA
+Miami-Fort Lauderdale-Miami Beach, FL MSA
*Minneapolis-St. Paul-Bloomington, MN-WI MSA
*Mohave County, AZ
*Monroe, MI MSA
*Muskegon-Norton Shores, MI MSA
*+Newark, NJ HMFA
*Nye County, NV
*Oakland-Fremont, CA HMFA
*Ogden-Clearfield, UT MSA
*Oklahoma City, OK HMFA
Orange County, CA HMFA
*Oxnard-Thousand Oaks-Ventura, CA MSA
*+Philadelphia-Camden-Wilmington, PA-NJ-DE-MD MSA
Phoenix-Mesa-Scottsdale, AZ MSA
*Pottawatomie County, OK
Richmond, VA HMFA
*+Sacramento—Arden-Arcade—Roseville, CA
*Salt Lake City, UT HMFA
*San Antonio, TX HMFA
*San Diego-Carlsbad-San Marcos, CA MSA
*San Jose-Sunnyvale-Santa Clara, CA HMFA
*St. Louis, MO-IL HMFA
*Tampa-St. Petersburg-Clearwater, FL MSA
*Tulsa, OK HMFA
Virginia Beach-Norfolk-Newport News, VA-NC MSA
*Warren County, NJ HMFA
Washington-Arlington-Alexandria, DC-VA-MD HMFA
*Wichita, KS HMFA

The following subsections describe HUD's application of the eligibility criteria for 50th percentile FMRs, set forth in 24 CFR 888.113, to the proposed FY2006 50th percentile FMR areas, and explain which areas lost eligibility for the 50th percentile FMR based on each criterion. The application of HUD's Information Quality Guidelines and findings of ineligibility of FMR areas on the basis of inadequate information on concentration of participants are described in the subsection on the ''concentration of participants'' (Concentration of Participants) criterion. The final section identifies 10 additional proposed FY2006 FMR areas originally assigned 40th percentile FMRs that are eligible, under the regulatory criteria and information quality guidelines, for 50th percentile FMRs.

Continued Eligibility: FMR Area Size Criterion

Application of the modified new OMB metropolitan area definitions results in several peripheral counties of FY2005 50th percentile FMR areas being separated from their core areas. The separated areas become either non-metropolitan counties, parts of different metropolitan areas, or form entirely new metropolitan areas. Table 2 shows proposed FY2006 FMR areas that are ineligible to receive 50th percentile FMRs because, as a result of the new metropolitan area definitions, they each have fewer than 100 census tracts and therefore fail to meet the FMR area size criterion.

TABLE 2.—PROPOSED FY2006 50TH PERCENTILE FMR AREAS WITH FEWER THAN 100 CENSUS TRACTS

	Tracts
Allegan County, MI	21
Ashtabula County, OH	22
Holland-Grand Haven, MI MSA	36
Hood County, TX	5
Mohave County, AZ	30
Monroe, MI MSA	39
Muskegon-Norton Shores, MI MSA	45
Nye County, NV	10
Ogden-Clearfield, UT MSA	93
Pottawatomie County, OK	15
Warren County, NJ HMFA	23

Continued Eligibility: Concentration of Affordable Units

The original 50th percentile FMR determination in 2000 measured the Concentration of Affordable Units criterion with data from the 1990 Census because 2000 Census data were not available. According to 2000 Census data, the FMR areas, shown in Table 3, and assigned proposed FY2006 50th percentile FMRs have more than 70 percent of their tracts containing 10 or more rental units where at least 30 percent of rental units rent for the 40th percentile two-bedroom FMR or less. These areas therefore fail to meet the Concentration of Affordable Units criterion and are not eligible for 50th percentile FMRs (FMR areas that are listed above as too small and also fail to meet this criterion are not listed here). In Table 3, the percentages following each FMR area name are, respectively, the 1990 Census and 2000 Census percent of tracts containing 10 or more rental units where at least 30 percent of rental units rent for the 40th percentile two-bedroom FMR or less. This number must be no greater than 70 percent for an FMR Area to qualify for 50th percentile FMRs.

TABLE 3.—PROPOSED FY2006 50TH PERCENTILE FMR AREAS WHERE AFFORDABLE UNITS ARE NOT CONCENTRATED

FMR Area	1990[1]	2000
Atlanta-Sandy Springs-Marietta, GA HMFA	69.5	72.8
Baton Rouge, LA HMFA	69.2	80.3

[1] The 1990 percent of tracts containing 10 or more rental units where at least 30 percent of rental units rent for the 40th percentile 2-bedroom FMR or less is the figure computed for the original old-definition FMR area that was assigned the 50th percentile FMR in 2000. The 2000 figure may differ both because of change between the two decennial censuses as well as change in the geographic definition of the FMR areas.

TABLE 3.—PROPOSED FY2006 50TH PERCENTILE FMR AREAS WHERE AFFORDABLE UNITS ARE NOT CONCENTRATED—Continued

FMR Area	1990[1]	2000
Buffalo-Niagara Falls, NY MSA	67.7	75.4
Cleveland-Elyria-Mentor, OH MSA	62.3	70.3
Detroit-Warren-Livonia, MI HMFA	65.7	72.7
Minneapolis-St. Paul, MN-WI MSA	65.0	73.1
Oakland-Fremont, CA HMFA	67.8	74.4
Oklahoma City, OK HMFA	63.1	71.5
Oxnard-Ventura, CA MSA	68.1	71.8
St. Louis, MO-IL HMFA	69.9	71.1
Salt Lake City, UT HMFA	66.3	70.6
San Antonio, TX HMFA	66.0	70.7
San Jose-Santa Clara, CA HMFA	67.5	74.8
Tampa-St. Petersburg, FL MSA	63.9	74.1
Tulsa, OK HMFA	67.5	70.4
Wichita, KS HMFA	68.4	70.2

Continued Eligibility: Concentration of Participants

The Concentration of Participants criterion requires that 25 percent or more of voucher program participants be located in the five percent of census tracts with the highest number of voucher participants. Otherwise, an area is not eligible for 50th percentile FMRs. The data for evaluating the Concentration of Participants criterion comes from HUD's Public Housing Information Center (PIC). All public housing authorities (PHAs) that administer Housing Choice Voucher (HCV) programs must submit, on a timely basis, family records to HUD's PIC as set forth by 24 CFR part 908 and the consolidated annual contributions contract (CACC). PIC is the Department's official system to track and account for HCV family characteristics, income, rent, and other occupancy factors. PHAs must submit their form HUD–50058 records electronically to HUD for all current HCV families. Under HUD Notice PIH 2000–13 (HA), PHAs were required to successfully submit a minimum of 85 percent of their resident records to PIC during the measurement period covered by this notice (this requirement was raised to 95 percent by HUD Notice PIH 2005–17 (HA), but this higher reporting rate requirement is not used for purposes of this notice because it does not become effective until December 31, 2005, data submissions by PHAs).

Under HUD's Information Quality Guidelines,[2] the data used to determine eligibility for 50th percentile FMRs qualifies as ''influential'' and is therefore subject to a higher ''level of scrutiny and pre-dissemination review'' including ''robustness checks'' because ''public access to data and methods will not occur'' due to HUD's statutory duty to protect private information.[3] HUD cannot reasonably base the eligibility decision on inadequate data.

The information used to determine which FMR areas are assigned 50th percentile FMRs is ''influential'' because it has ''a clear and substantial impact,'' namely because it can potentially affect how voucher subsidy levels will be set in up to 108 large FMR areas containing about 59 percent of voucher tenants, thereby affecting ''a broad range of parties.'' PHA voucher payment standards are set according to a percentage of the FMR, so the setting of 50th percentile FMRs ''has a high probability'' of affecting subsidy levels for tenants in the affected FMR areas. An ''important'' public policy is affected by the decisions rendered from the information, namely the goal of deconcentrating voucher tenants and improving their access to jobs and improved quality of life.

Under HUD's Final Information Quality Guidelines, influential information that is developed using data that cannot be released to the public under Title XIII or for ''other compelling interests'' is subject to ''robustness checks'' to address, among other things, ''sources of bias or other error'' and ''programmatic and policy

[2] Section 515 of the Treasury and General Government Appropriations Act for FY2001 (Pub.L. 106–554) directed the OMB to issue governmentwide guidelines that ''provide policy and procedural guidance to federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by federal agencies.'' Within one year after OMB issued its guidelines, agencies were directed to issue their own guidelines that described internal mechanisms by which agencies ensure that their information meets the standards of quality, objectivity, utility, and integrity. The mechanism also must allow affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines. OMB issued its final guidelines on September 28, 2001 (66 FR 49718), but requested additional comment on one component of the OMB guidelines. The OMB guidelines addressing additional public comment were published on January 3, 2002 (67 FR 369), and republished on February 22, 2002 (67 FR 6452). HUD issued its Final Information Quality Guidelines on November 18, 2002 (67 FR 69642), which follow public comment on proposed guidelines published on May 30, 2002 (67 FR 37851).

[3] Note that 13 U.S.C. 9 governs the confidentiality of census data. The Privacy Act (5 U.S.C. 552) governs confidentiality of the data used to evaluate the Concentration of Participants criterion.

implications.'' The typical reason for a low overall reporting rate in an FMR area is very low reporting rates by the largest PHAs in the FMR area (or non-reporting in the case of Moving-to-Work program PHAs that are not required to report). Unless it could be shown that underreporting is essentially random (which would be difficult and impose a major administrative burden on HUD), low reporting rates render any results derived from the data inaccurate, unreliable, and biased.

The setting of a reporting rate threshold for consideration of eligibility for 50th percentile FMRs is, therefore, justified because it constitutes a ''robustness check'' on ''influential information'' as defined in HUD's Final Information Quality Guidelines. HUD sets the overall FMR area minimum reporting rate standard at 85 percent based on the minimum requirements established for PHA reporting rates.

Of the 21 areas passing the FMR Area Size and Concentration of Affordable Units criteria, the five listed below in Table 4 have data quality issues in measuring Concentration of Participants in 2005 because of low reporting by PHAs in the FMR area.

TABLE 4.—PROPOSED FY2006 50TH PERCENTILE FMR AREAS MEETING FMR AREA SIZE AND CONCENTRATION OF AFFORDABLE UNITS CRITERIA, BUT HAVING REPORTING RATES BELOW 85 PERCENT AS DERIVED FROM THE MAY 31, 2005, DELINQUENCY REPORT [4]

Dallas, TX HMFA	83.2
Miami-Fort Lauderdale-Miami Beach, FL MSA	83.5
Newark, NJ HMFA	79.9
Philadelphia-Camden-Wilmington, PA-NJ-DE-MD MSA	54.0
Sacramento-Arden-Arcade-Roseville, CA HMFA	62.7

The only area with a proposed FY2006 50th percentile FMR that met the first two eligibility criteria, had adequate data to measure Concentration of Participants, but failed to meet 25 percent concentration criterion, is the San Diego-Carlsbad-San Marcos, CA MSA.[5]

Continued Eligibility: Deconcentration of Participants

HUD's regulations in 24 CFR 888.113 specify that areas assigned 50th percentile rents are to be reviewed at the end of three years, and that the 50th percentile rents will be rescinded if no progress has been made in deconcentrating voucher tenants. FMR Areas that failed this test are ineligible for 50th percentile FMRs for the subsequent three years. Three FMR areas with proposed FY2006 50th percentile FMRs that passed the other 50th percentile eligibility tests failed to deconcentrate voucher tenants between 2000 and 2005. They are the Bergen-Passaic, NJ HMFA, the Newark, NJ HMFA, and the Philadelphia-Camden-Wilmington, PA-NJ-DE-MD MSA.

With the exception of the Bergen-Passaic, NJ HMFA, however, this conclusion is based on poor quality data. The other two areas do not have sufficient reporting rates as derived from the May 31, 2005, Delinquency Report to measure deconcentration progress. Therefore, the Newark, NJ HMFA and the Philadelphia-Camden-Wilmington, PA-NJ-DE-MD MSA are ineligible for 50th percentile FMRs because neither concentration nor deconcentration progress can be measured accurately based on data provided by PHA reporting. If reporting in these FMR areas has increased sufficiently when future evaluations of deconcentration are made, and eligibility can be established with increased reporting rates, the 50th percentile FMRs could be reinstated before the end of a three-year hiatus.

Since the Bergen-Passaic, NJ HMFA has not demonstrated progress in deconcentrating voucher participants, and this measurement is made with data of adequate quality (85.7 percent reporting rate), the Bergen-Passaic, NJ HMFA is ineligible for FY2006 50th percentile FMRs. The 40th percentile Bergen-Passaic, NJ HMFA FMR is almost identical to the revised proposed New York-Bergen-Passaic-Monmouth-Ocean NY-NJ HMFA of which the originally proposed Bergen-Passaic, NJ HMFA is a part. So, as a result of losing its 50th percentile status, the Bergen-Passaic, NJ HMFA is combined into the revised proposed New York-Bergen-Passaic-Monmouth-Ocean, NY-NJ HMFA and shares the same revised proposed FY2006 FMRs with the component counties of this area as indicated in Schedule B of this notice.

Table 5 lists the areas, originally assigned 50th percentile FMRs, and also assigned proposed FY2006 50th percentile FMRs that meet all eligibility criteria, that have shown evidence of participant deconcentration, and have sufficient Reporting Rates as derived from the May 31, 2005, Delinquency Report to make an accurate assessment of participant concentration.

TABLE 5.—PROPOSED FY2006 50TH PERCENTILE FMR AREAS THAT SHOULD CONTINUE AS 50TH PERCENTILE AREAS

Albuquerque, NM MSA
Austin-Round Rock, TX MSA
Chicago-Naperville-Joliet, IL HMFA
Denver-Aurora, CO MSA
Fort Worth-Arlington, TX HMFA
Grand Rapids-Wyoming, MI HMFA
Houston-Baytown-Sugar Land, TX HMFA
Kansas City, MO-KS HMFA
Las Vegas-Paradise, NV MSA
Orange County, CA HMFA
Phoenix-Mesa-Scottsdale, AZ MSA
Richmond, VA HMFA
Virginia Beach-Norfolk-Newport News, VA-NC MSA
Washington-Arlington-Alexandria, DC-VA-MD HMFA

Newly Eligible Areas

Table 6 lists the FY2006 FMR areas not originally assigned proposed 50th percentile FMRs that meet the eligibility requirements for 50th percentile FMRs and have sufficient Reporting Rates as derived from the May 31, 2005, Delinquency Report (more than 85 percent overall for the FMR area) to evaluate the Concentration of Participants. There were no FY2006 FMR areas originally assigned proposed 40th percentile FMRs that otherwise met the eligibility requirements for 50th percentile FMRs, but were deemed ineligible by having insufficient Reporting Rates as derived from the May 31, 2005, Delinquency Report.

TABLE 6.—PROPOSED FY2006 40TH PERCENTILE FMR AREAS THAT SHOULD BE ASSIGNED 50TH PERCENTILE FMRS

Baltimore-Towson, MD MSA
Hartford-West Hartford-East Hartford, CT HMFA
Honolulu, HI MSA
Milwaukee-Waukesha-West Allis, WI MSA
New Haven-Meriden, CT HMFA
Providence-Fall River, RI-MA HMFA
Riverside-San Bernardino-Ontario, CA MSA
Sarasota-Bradenton-Venice, FL MSA

[4] For most PHAs the reporting rate comes directly from the Delinquency Report and is the ratio of form 50058 received to required units. In some cases, the number of 50058 required units was inconsistent with other figures on the number of HCV participants served by the PHA and was replaced with either the December 2004 leased units (if available) or Annual Contribution Contracts (ACC) units. The two significant instances where this procedure was used and negatively affected FMR area reporting rates in this table because the resulting PHA rates were below 85 percent are as follows: Dallas, TX HA (15,975 ACC units, PHA Report Rate 78.3%) and Philadelphia, PA HA (15,641 leased units, PHA Report Rate 0.0%).

[5] The Sacramento-Arden-Arcade-Roseville, CA HUD FMR, in a measure based on inadequate data, also had a concentration ratio of less than 25 percent but is deemed ineligible based on data quality.

TABLE 6.—PROPOSED FY2006 40TH PERCENTILE FMR AREAS THAT SHOULD BE ASSIGNED 50TH PERCENTILE FMRS—Continued

Tacoma, WA HMFA
Tucson, AZ MSA

Revised proposed FY2006 FMRs for the areas affected by this notice are listed in Schedule B of the June 2, 2005, notice. Consistent with current regulations, PHAs must obtain the approval of their governing board to implement use of 50th percentile FMRs or payment standards based on those FMRs. Other information pertaining to the proposed FY2006 FMRs is unchanged from the June 2, 2005, notice.

Dated: August 12, 2005.

Roy A. Bernardi,

Deputy Secretary.

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ARIZONA

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
*Tucson, AZ MSA	486	571	746	1076	1209	Pima

NONMETROPOLITAN COUNTIES	0 BR	1 BR	2 BR	3 BR	4 BR
Mohave	509	560	653	903	1008

CALIFORNIA

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
Oxnard-Thousand Oaks-Ventura, CA MSA	982	1084	1379	1976	2260	Ventura
*Riverside-San Bernardino-Ontario, CA MSA	715	781	911	1294	1512	Riverside, San Bernardino
Sacramento--Arden-Arcade--Roseville, CA HMFA	691	786	959	1384	1586	El Dorado, Placer, Sacramento
San Diego-Carlsbad-San Marcos, CA MSA	760	870	1065	1514	1871	San Diego
Oakland-Fremont, CA HMFA	865	1045	1238	1679	2079	Alameda, Contra Costa
San Jose-Sunnyvale-Santa Clara, CA HMFA	876	1015	1220	1754	1931	Santa Clara

CONNECTICUT

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Components of FMR AREA within STATE
*Hartford-West Hartford-East Hartford, CT HMFA	669	801	979	1176	1460	Hartford County towns of Avon town, Berlin town, Bloomfield town, Bristol town, Burlington town, Canton town, East Granby town, East Hartford town, East Windsor town, Enfield town, Farmington town, Glastonbury town, Granby town, Hartford town, Hartland town, Manchester town, Marlborough town, New Britain town, Newington town, Plainville town, Rocky Hill town, Simsbury town, Southington town, South Windsor town, Suffield town, West Hartford town, Wethersfield town, Windsor town, Windsor Locks town Middlesex County towns of Chester town, Cromwell town, Durham town, East Haddam town, East Hampton town, Haddam town, Middlefield town, Middletown town, Portland town Tolland County towns of Andover town, Bolton town, Columbia town, Coventry town, Ellington town, Hebron town, Mansfield town, Somers town, Stafford town, Tolland town, Union town, Vernon town, Willington town
*New Haven-Meriden, CT HMFA	732	830	1003	1201	1372	New Haven County towns of Bethany town, Branford town, Cheshire town, East Haven town, Guilford town, Hamden town, Madison town, Meriden town, New Haven town, North Branford town, North Haven town, Orange town, Wallingford town, West Haven town, Woodbridge town

DELAWARE

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
Philadelphia-Camden-Wilmington, PA-NJ-DE-MD MSA	649	742	886	1061	1262	New Castle

FLORIDA

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
Miami-Fort Lauderdale-Miami Beach, FL MSA	652	752	911	1205	1377	Broward, Miami-Dade, Palm Beach

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FLORIDA continued

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
*Sarasota-Bradenton-Venice, FL MSA	625	685	824	1052	1156	Manatee, Sarasota
Tampa-St. Petersburg-Clearwater, FL MSA	585	649	785	995	1201	Hernando, Hillsborough, Pasco, Pinellas

GEORGIA

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
Atlanta-Sandy Springs-Marietta, GA HMFA	633	686	763	929	1013	Barrow, Bartow, Carroll, Cherokee, Clayton, Cobb, Coweta, Dawson, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Heard, Henry, Jasper, Newton, Paulding, Pickens, Pike, Rockdale, Spalding, Walton

HAWAII

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
*Honolulu, HI MSA	836	997	1205	1757	2069	Honolulu

ILLINOIS

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
St. Louis, MO-IL HMFA	485	526	654	842	882	Calhoun, Clinton, Jersey, Madison, Monroe, St. Clair
Bond County, IL HMFA	307	328	426	619	728	Bond
Macoupin County, IL HMFA	398	399	479	597	618	Macoupin

KANSAS

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
Wichita, KS HMFA	408	457	600	767	863	Butler, Harvey, Sedgwick

LOUISIANA

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
Baton Rouge, LA HMFA	458	499	576	734	808	Ascension, East Baton Rouge, East Feliciana, Livingston, Pointe Coupee, St. Helena, West Baton Rouge, West Feliciana

MARYLAND

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
*Baltimore-Towson, MD MSA	700	791	950	1220	1507	Anne Arundel, Baltimore, Carroll, Harford, Howard, Queen Anne's, Baltimore city
Philadelphia-Camden-Wilmington, PA-NJ-DE-MD MSA	649	742	886	1061	1262	Cecil

MASSACHUSETTS

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Components of FMR AREA within STATE
*Providence-Fall River, RI-MA HMFA	757	827	965	1155	1472	Bristol County towns of Attleboro city, Fall River city, North Attleborough town, Rehoboth town, Seekonk town, Somerset town, Swansea town, Westport town

MICHIGAN

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
Detroit-Warren-Livonia, MI HMFA	565	644	770	921	949	Lapeer, Macomb, Oakland, St. Clair, Wayne
Holland-Grand Haven, MI MSA	532	541	649	898	970	Ottawa
Monroe, MI MSA	599	601	723	944	1040	Monroe
Muskegon-Norton Shores, MI MSA	393	410	533	705	725	Muskegon

NONMETROPOLITAN COUNTIES	0 BR	1 BR	2 BR	3 BR	4 BR	NONMETROPOLITAN COUNTIES	0 BR	1 BR	2 BR	3 BR	4 BR
Allegan	423	510	611	766	821						

MINNESOTA

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
Minneapolis-St. Paul-Bloomington, MN-WI MSA	598	705	855	1119	1258	Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Washington, Wright

MISSOURI

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
St. Louis, MO-IL HMFA	485	526	654	842	882	Sullivan city part of Crawford, Franklin, Jefferson, Lincoln, St. Charles, St. Louis, Warren, St. Louis city
Washington County, MO HMFA	308	359	403	530	592	Washington

NEVADA

NONMETROPOLITAN COUNTIES	0 BR	1 BR	2 BR	3 BR	4 BR	NONMETROPOLITAN COUNTIES	0 BR	1 BR	2 BR	3 BR	4 BR
Nye	409	568	631	919	947						

NEW JERSEY

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
Warren County, NJ HMFA	763	854	999	1196	1231	Warren
New York-Bergen-Passaic-Monmouth-Ocean, NY-NJ HMFA	934	996	1125	1395	1545	Bergen, Monmouth, Ocean, Passaic
Newark, NJ HMFA	719	879	1004	1202	1329	Essex, Morris, Sussex, Union
Philadelphia-Camden-Wilmington, PA-NJ-DE-MD MSA	649	742	886	1061	1262	Burlington, Camden, Gloucester, Salem

NEW YORK

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
Buffalo-Niagara Falls, NY MSA	487	488	586	725	800	Erie, Niagara
New York-Bergen-Passaic-Monmouth-Ocean, NY-NJ HMFA	934	996	1125	1395	1545	Bronx, Kings, New York, Putnam, Queens, Richmond, Rockland

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OHIO

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
Cleveland-Elyria-Mentor, OH MSA	488	566	682	874	929	Cuyahoga, Geauga, Lake, Lorain, Medina

NONMETROPOLITAN COUNTIES	0 BR	1 BR	2 BR	3 BR	4 BR
Ashtabula	394	463	590	750	874

OKLAHOMA

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
Oklahoma City, OK HMFA	425	464	564	761	816	Canadian, Cleveland, Logan, McClain, Oklahoma
Grady County, OK HMFA	322	359	446	603	693	Grady
Lincoln County, OK HMFA	360	361	435	573	591	Lincoln
Tulsa, OK HMFA	456	495	605	799	825	Creek, Osage, Rogers, Tulsa, Wagoner

NONMETROPOLITAN COUNTIES	0 BR	1 BR	2 BR	3 BR	4 BR
Pottawatomie	393	447	497	630	731

PENNSYLVANIA

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
Philadelphia-Camden-Wilmington, PA-NJ-DE-MD MSA	649	742	886	1061	1262	Bucks, Chester, Delaware, Montgomery, Philadelphia

RHODE ISLAND

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Components of FMR AREA within STATE
*Providence-Fall River, RI-MA HMFA	757	827	965	1155	1472	Bristol County towns of Barrington town, Bristol town, Warren town Kent County towns of Coventry town, East Greenwich town, Warwick city, West Greenwich town, West Warwick town Newport County towns of Jamestown town, Little Compton town, Tiverton town Providence County towns of Burrillville town, Central Falls city, Cranston city, Cumberland town, East Providence city, Foster town, Glocester town, Johnston town, Lincoln town, North Providence town, North Smithfield town, Pawtucket city, Providence city, Scituate town, Smithfield town, Woonsocket city Washington County towns of Charlestown town, Exeter town, Narragansett town, North Kingstown town, Richmond town, South Kingstown town

TEXAS

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
Dallas, TX HMFA	548	607	733	954	1129	Collin, Dallas, Delta, Denton, Ellis, Hunt, Kaufman, Rockwall
San Antonio, TX HMFA	500	556	687	886	1077	Bandera, Bexar, Comal, Guadalupe, Wilson

NONMETROPOLITAN COUNTIES	0 BR	1 BR	2 BR	3 BR	4 BR
Hood	449	487	542	716	951

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UTAH

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
Ogden-Clearfield, UT MSA	416	501	617	848	1003	Davis, Morgan, Weber
Salt Lake City, UT HMFA	526	572	690	971	1130	Salt Lake

WASHINGTON

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
*Tacoma, WA HMFA	532	621	774	1128	1269	Pierce

WISCONSIN

METROPOLITAN FMR AREAS	0 BR	1 BR	2 BR	3 BR	4 BR	Counties of FMR AREA within STATE
*Milwaukee-Waukesha-West Allis, WI MSA	496	591	706	890	916	Milwaukee, Ozaukee, Washington, Waukesha
Minneapolis-St. Paul-Bloomington, MN-WI MSA	598	705	855	1119	1258	Pierce, St. Croix

Note1: The FMRs for unit sizes larger then 4 BRs are calculated by adding 15% to the 4 BR FMR for each extra bedroom.
Note2: 50th percentile FMRs are indicated by an * before the FMR Area name. 07/30/2005

Technical Appendix to Schedule B

Under the FMR computation methodology described in the June 2, 2005, notice on proposed FY2006 FMRs, 6 additional FMR areas have altered rents from those originally proposed as a result of the changes in 50th percentile FMR areas. They are:

FMR Area Name	Original Proposed FY2006 2-Bedroom FMR	Revised Proposed FY2006 2-Bedroom FMR
Bond County, IL HMFA	420	426
Macoupin County, IL HMFA	471	479
Washington County, MO HMFA	397	403
Grady County, OK HMFA	426	446
Lincoln County, OK HMFA	423	435
New York-Bergen-Passaic-Monmouth-Ocean, NY-NJ HMFA (New York-Monmouth-Ocean, NY-NJ part)	1,133	1,125

The rents of the first five HMFAs change because, as described in the June 2, 2005, notice, subareas of Core Based Statistical Areas (CBSAs) use the CBSA 2005-to-2006 update factor. Bond, Macoupin, and Washington counties are subareas of the St. Louis, MO-IL Metro CBSA, and Grady and Lincoln counties are subareas of the Oklahoma City, OK Metro CBSA. Both St. Louis and Oklahoma City had Random Digit Dialings (RDDs) done in 2005 for implementation in FY2006 FMRs. All RDDs are evaluated at the FMR standard in effect (40th or 50th percentile) for the CBSA, which in these cases was the 50th percentile standard because more than 75 percent of the CBSAs' populations were in FY2005 50th percentile FMR areas. In the case of both St. Louis and Oklahoma City, the RDDs evaluated at the 40th percentile indicated a smaller decrease than the RDDs evaluated at the 50th percentile. Therefore, the switch from the 50th percentile standard to the 40th percentile standard resulted in a smaller downward adjustment of rents from 2005 to 2006 in these CBSAs, which caused the revised proposed 40th percentile rents of the associated subareas to be higher than the originally proposed 40th percentile rents.

Also, as described in the June 2, 2005, notice, the 2000 to 2005 update factor is a population-weighted average of the ratios of the revised final FY2005 FMRs to the 2000 Census Base Rents of the subareas that make up the FY2006 FMR area. The recombination of the Bergen-Passaic, NJ HMFA and the New York-Monmouth-Ocean HMFA, to form the New York-Bergen Passaic-Monmouth-Ocean, NY-NJ HMFA, results in a slightly smaller 2000-to-2005 update factor for the combined area than that which had applied to the originally proposed New York-Monmouth-Ocean, NY-NJ HMFA. This results in revised proposed FY2006 FMRs for the New York-Monmouth-Ocean, NY-NJ part of the recombined area that are slightly lower than those originally proposed.

[FR Doc. 05–16865 Filed 8–24–05; 8:45 am]
BILLING CODE 4210–32–C

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Thursday, August 25, 2005

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To authorize the Secretary of the Interior to contract with the city of Cheyenne, Wyoming, for the storage of the city's water in the Kendrick Project, Wyoming. (Aug. 2, 2005; 119 Stat. 455)

H.J. Res. 59/P.L. 109–49

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To designate the facility of the United States Postal Service located at 1915 Fulton Street in Brooklyn, New York, as the ''Congresswoman Shirley A. Chisholm Post Office Building''. (Aug. 2, 2005; 119 Stat. 459)

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To amend the Controlled Substances Act to lift the patient limitation on prescribing drug addiction treatments by medical practitioners in group practices, and for other purposes. (Aug. 2, 2005; 119 Stat. 591)

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